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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. 245.

JAMES L. SHARP, APPELLANT,

vs.

THE DOVER STAMPING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 10, 1878.

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1 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy-seven.

Before the honorable George F. Shepley, circuit judge.

JAMES L. SHARP, COMPLAINANT,
v.
THE DOVER STAMPING COMPANY, DEFENDANT. } In equity.

The bill of complaint in this cause was filed in the clerk's office on the third day of May, A. D. 1876, and was duly entered at the October term of this court A. D. 1875, and is in the words and figures following, namely:

2 *Bill of complaint.*

To the judges of the circuit court of the United States for the district of Massachusetts:

James L. Sharp, of New York City, in the county of New York, and State of New York, and a citizen of the State of New York, brings this his bill of complaint against "The Dover Stamping Company," a corporation doing business in the city of Boston, county of Suffolk, and State of Massachusetts, and, as your orator is informed and believes, duly incorporated and organized under the laws of the State of Massachusetts, and thereupon your orator complains and says:

That one Hiram Y. Lazear, being then a citizen of the United States, was, before the 14th day of July, A. D. 1868, the true and original inventor or discoverer of a new and useful improvement in gas heaters, which said invention or improvement was not known or used by others before the invention or discovery thereof by the said Hiram Y. Lazear. That the said Hiram Y. Lazear thereupon afterwards did apply to the Commissioner of Patents for letters-patent of the United States for such improvements, and having fully and in all respects complied with all the requirements of the law in that behalf, and especially having made oath that he verily believes himself to be the true inventor or discoverer of the said improvement, and also having paid into the Treasury of the United States the sum of thirty-five dollars, and presented to the Commissioner of Patents a petition setting forth his desire to obtain an exclusive property in said improvement, and praying that letters patent of the United States might for that purpose be granted unto him, and having also delivered and filed in said office of the Commissioner of Patents a written description of his said improvement in such full, clear and exact terms as to enable any person skilled in the art with which the said improvement is most nearly connected to make and use the same, which said description was duly signed by said Hiram Y.

3 Lazear, and thereupon the said Commissioner of Patents caused letters-patent to be made out in the name of the United States of America, in due form of law in all respects, bearing date the 14th day of July, A. D. 1868, and numbered 79989, whereby was granted unto the said Hiram Y. Lazear, for the term of seventeen years from the date thereof, the full and exclusive right and liberty of making, constructing, using and vending to others to be used the said improvement,

which is entitled in said letters-patent "gas heaters," and the said letters-patent having been signed by the Secretary of the Interior of the United States, and countersigned and sealed with the seal of the Patent Office by the Commissioner of Patents of the United States, and the same having been duly recorded, were issued and delivered unto the said Hiram Y. Lazear, and by virtue thereof the said Hiram Y. Lazear became and was the sole owner of all the rights and privileges granted and secured or intended to be secured in and by said letters-patent, as by reference to said letters-patent or a certified copy thereof, here in court ready to be produced, will more fully and at large appear.

And your orator further shows unto your honors, that on or about the 14th day of March, A. D. 1871, the said Hiram Y. Lazear, by his deed of that date, duly executed and recorded for valuable consideration, assigned and conveyed unto one William Phillips, of the city of New Bedford, county of Bristol, and State of Massachusetts, all his, Hiram Y. Lazear's, right, title and interest in and to the said invention and letters-patent above mentioned, as by the said assignment or a duly certified copy thereof, here in court ready to be produced, will more fully and at large appear.

And your orator further shows unto your honors, that on or about the 29th day of April, A. D. 1876, the said William Phillips, by his deed of that date, duly executed and recorded, for valuable consideration assigned and conveyed unto your orator, James L. Sharp, all his, William Phillips', right, title and interest in and to the said invention and letters-patent above named, and also the right and privilege to recover damages for past infringement of said letters-patent, so that by the said assignment your orator became and now is the sole and exclusive owner of all the right, title and interest in and to the said invention and letters-patent, as by reference to said assignment or a duly certified copy thereof, here in court ready to be produced, and will more fully and at large appear.

4 And your orator further shows unto your honors that he now is the sole and exclusive owner of the said letters-patent for gas heaters, and that the rights and interests under said letters-patent have been and are of great value to your orator, and that your orator is entitled to recover all the damages occasioned by the infringement of said letters patent, by the manufacture, use, or sale of gas heaters, as described and claimed in said letters-patent, and that he is by law entitled to sue for and receive the same to his own use.

And your orator further shows unto your honors that he verily believes, and therefore charges the fact to be, that the said Hiram Y. Lazear was the original and first inventor of the improvement in gas heaters, granted to him as aforesaid, and described and claimed in the said letters-patent as aforesaid, and that the same was not known or used by any other person before the invention thereof by the said Hiram Y. Lazear.

And your orator further shows unto your honors, that he is at the present time, and has been actively engaged in the manufacture and sale of said patented gas heaters, and that he is ready, willing and prepared to supply the demands of the market for the same, and that he would, but for the unlawful and wrongful acts of the defendant, derive great gains and profits from such manufacture and sale of such patented article.

And your orator further shows unto your honors, on information and belief, that since the said 14th day of July, A. D. 1868, the defendant.

"The Dover Stamping Company," well knowing the premises, and the rights and privileges secured first to the said Hiram Y. Lazear, next to the said Wm. Phillips, and finally to your orator, the said James L. Sharp, by the said letters-patent and assignments, but contriving to injure said Hiram Y. Lazear, said William Phillips, and your orator, and to deprive them and him of the profits, benefits and advantages which might otherwise have accrued to them and him at the city of Boston and elsewhere, within the district aforesaid and elsewhere, has unlawfully and wrongfully made, used and sold, and caused others to make, use and sell, and is now unlawfully and wrongfully making, using and selling large quantities of gas heaters, as described and claimed in said letters-patent, and in violation of the exclusive privilege of your orator to make, use and sell the same as aforesaid, and in infringement of the said letters-patent, but what quantities of gas heaters infringing said letters-patent the said defendant has made, used or sold, or caused to be made, used and sold, your orator does not know and cannot state, but upon information and belief your orator avers that said defendant has made, used and sold, and caused others to make, use and sell large quantities of the same, and that it has derived and received, and is still deriving and receiving from such manufacture, use and sale, great gains and profits, but to what amount your orator is ignorant and cannot set forth, but your orator believes the same to be the full sum of ten thousand dollars, and so charges the fact to be, and prays that the defendant may be required to make a disclosure of all such gains and profits. And your orator further avers that the defendant continues to make, use and sell such gas heaters, patented as aforesaid, and refuses, though warned and requested so to do, to desist from such manufacture, use and sale, or to pay to your orator such gains and profits by means whereof the defendant has deprived and is still depriving your orator of, and has prevented and is still preventing your orator from receiving the gains and profits from the use of the exclusive right to manufacture, use and sell the invention and improvement in gas heaters, claimed in the said letters-patent, which your orator otherwise, and but for the said wrongful acts of the said defendant, would have obtained and received.

5

And your orator further shows unto your honors that the aforesaid manufacture, use and sale of said gas heaters, infringing said letters-patent, by the said defendant, and its preparation and determination to continue the same and the aforesaid unlawful and wrongful acts, have the effect to encourage and induce other persons to infringe and defy the said letters-patent and the aforesaid right of your orator under the the same.

And your orator prays that said defendant, "The Dover Stamping Company," may be required to answer the premises and may, by a decree of this honorable court, be compelled to account for and pay over to your orator all such gains and profits as have accrued, or arisen to, or been earned or received by the defendant or to which your orator may be entitled by reason of such unlawful manufacture, use, and sale by the said defendant, and its agents and attorneys, of all gas heaters as described and claimed in the letters-patent aforesaid, and all such gains and profits as your orator would have received but for the said unlawful acts and doings of the said defendant and its confederates.

6

And may it please your honors, the premises considered, to grant unto your orator the writ of perpetual injunction issuing out of and under the seal of this honorable court, or issued by one of your honors according to the form of the statute in such case made and

provided, perpetually enjoining and restraining the said defendant, "The Dover Stamping Company," its officers, directors, trustees and members, and its clerks, attorneys, servants and workmen, from directly or indirectly making or causing to be made, using or causing to be used, or vending to others to be used, gas heaters containing or embodying the invention described and claimed in said letters-patent, numbered 79989.

And may it please your honors to grant unto your orator a provisional or preliminary injunction, issued out of and under the seal of this honorable court, enjoining and restraining the said defendant, "The Dover Stamping Company," its officers, directors, trustees and members, and its attorneys, clerks, agents, servants and workmen, to the same purport, tenor and effect, as hereinbefore prayed for in regard to said perpetual injunction. And that the said defendant may be decreed to pay the costs of this suit, and that your orator may have such further or other relief in the premises as the nature of the circumstances of this case may require and to this honorable court may seem meet and agreeable to equity.

And may it please your honors to grant unto your orator a writ of subpœna ad respondendum of the United States of America, issued out of and under the seal of this honorable court, directed to said defendant, "The Dover Stamping Company," commanding the same, on a certain day therein to be named, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to and perform and abide such further order, direction and decree as may be made against it.

And your orator, as in duty bound, will ever pray, etc.

JAMES. L. SHARP.

THOS. L. LIVERMORE,
Solicitor and of Counsel for Complainant.

A. v. BRIESEN,
Of Counsel.

7 UNITED STATES OF AMERICA,
County of New York, Southern District of New York, ss:

James L. Sharp, being duly sworn, deposes and says: that he is the complainant in the foregoing bill named, and has read the same and knows the contents thereof. That said bill is true of his own knowledge, except as to those matters which are therein stated to be on his information or belief, and as to those matters he believes it to be true, and this deponent verily believes the said Hiram Y. Lazear to have been the first and original inventor of the improvement claimed in the letters-patent mentioned in the foregoing bill of complaint, and that the same had not been in use or described before the invention or discovery thereof by the said Hiram Y. Lazear.

JAMES L. SHARP.

Subscribed and sworn to before me this 2d May, 1876.

R. E. STILWELL.
U. S. Com'r for Southern District of New York.

This cause was thence continued to the May term of this court, A. D. 1876, when, on the thirtieth day of June, A. D. 1876, the following demurrer and answer was filed, namely:

8 *Demurrer and answer.*

The demurrer of said The Dover Stamping Company to part, and the answer of same defendant to the residue, of the bill of complaint of said James L. Sharp.

This defendant, by protestation, not confessing all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, demurs to so much and such part of said bill as prays for discovery, account, or other relief for or by reason of any alleged or supposed cause of action arising from any infringement of the letters patent No. 79989, therein mentioned, prior to the 29th day of April, 1876, and for cause of demurrer shows that the complainant, as appears by his said bill, is not entitled to maintain the same upon any cause of action accruing prior to the 29th day of April, 1876, the date of the alleged assignment to him of said letters patent.

First. Because said complainant was not and had not been the owner of said letters patent prior to said 29th day of April, 1876.

Second. Because the owners of said letters patent prior to said 29th day of April, 1876, are not made parties complainants to said bill in respect to any alleged or supposed cause of action arising prior to that date.

Third. Because any infringement of said letters patent prior to said 29th day of April, 1876, would constitute a separate, distinct and independent cause of action, which the complainant cannot join with any other alleged causes of action arising subsequent to the date of said alleged assignment as set forth in said bill, and this defendant prays the judgment of the court, whether it ought to make any other or further answer to such parts of the bill as it has demurred to as aforesaid.

9 And as to the residue of the said bill, that is to say, to that part of the same as prays for discovery, account, or other relief for or by reason of any alleged or supposed cause of action arising from and after the 29th day of April, 1876, for any infringement of said letters patent No. 79989, this defendant answers and says, that it is informed and believes that letters patent bearing date the fourteenth day of July, A. D. 1868, and numbered 79989, and purporting to grant to one Hiram Y. Lazear for the term of seventeen years from the said date thereof the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, a certain alleged invention therein entitled "an improvement in gas heaters," were issued from the Patent Office of the United States, but this defendant, upon information and belief, denies that said Hiram Y. Lazear was the true and original inventor or discoverer of any improvement in "gas heaters" therein described, or attempted to be described; or of any substantial and material part thereof; denies that the same had not been known or used by others before said alleged invention or discovery thereof by him; denies that said Hiram Y. Lazear was entitled to patent the same under the laws of the United States in such behalf enacted; denies that by virtue of the said letters patent the said Hiram Y. Lazear became possessed of any exclusive right and liberty whatsoever of making, constructing, using, and vending to others to be used said supposed improved gas heaters as set forth and claimed therein; and denies that said letters patent secured to him any exclusive rights and privileges of any kind whatsoever.

And this defendant, further answering, says that it is not informed

except by the allegations contained in said bill of complaint, and cannot set forth its belief, whether the said Hiram Y. Lazear did, on or about the 14th day of March, A. D. 1871, by deed of that date, assign and convey unto one William Phillips, of the city of New Bedford, county of Bristol, and State of Massachusetts, all his, the said Hiram Y. Lazear's, right, title, and interest in and to the said alleged invention and letters patent, or whether the said William Phillips did afterwards, on or about the 29th day of April, 1876, by deed of that date, assign and convey unto the complainant all his, the said William Phillips' right, title and interest in and to the said alleged invention and letters patent, and also the right and privilege to recover damages for supposed past infringements of said letters patent, but this defendant, upon information and belief, denies that by virtue of the said letters patent
10 numbered 79989, and of the terms of said alleged assignment or assignments, the complainant ever became possessed of or entitled to any exclusive right, privilege, interest or property in and to the said alleged invention or improvement, or any substantial and material part thereof, set forth and claimed in said letters patent, upon which the complainant attempts to found the charges of infringement contained in his said bill.

And this defendant, further answering, upon information and belief, denies that said complainant is the sole and exclusive owner said letters patent for gas heaters; denies that the rights and interest under said letters patent have been and are of great value, or of any value or importance to the complainant; denies that he is entitled to recover any damages occasioned by the alleged infringement of said letters patent, or that he is entitled by law to sue for or receive the same or any damages whatsoever to his own use for or by reason of any alleged infringement of said letters patent.

And this defendant, further answering, upon information and belief, denies that said Hiram Y. Lazear was the original and first inventer of the alieged improvement in gas heaters, granted to him as aforesaid, and described and claimed in said letters patent, or any substantial and material part of the things therein set forth and claimed as new and specified in said bill of complaint, and denies that the same was not known or used by any other person before the said alleged invention thereof by said Hiram Y. Lazear.

And this defendant, further answering, upon information and belief, denies that the complainant has been or now is actively engaged in the manufacture and sale of said alleged patented gas heaters, and that he is ready, willing or prepared to supply the demands of the market for the same, and denies that the complainant would derive great gains and profits from the manufacture and sale of said patented article, or any gains and profits whatsoever, but for the alleged unlawful and wrongful acts of the defendant.

And this defendant, further answering, upon knowledge, information and belief, denies that since the 14th day of July, 1868, the date of said letters patent so granted to said Hiram Y. Lazear, within the district of Massachusetts aforesaid, or elsewhere, it has made, used and
11 sold or caused others to make, use and sell, or is now making, using and selling large quantities of gas heaters, or any gas heaters whatsoever, embracing the alleged invention described and claimed in said letters patent in violation of any supposed or assumed exclusive privilege of the complainant to make, use and sell the same; and denies that it has infringed or is now infringing upon any exclusive rights and privileges which said letters patent purported

to secure to said Hiram Y. Lazear or his assigns, or which he intended to secure thereby.

And this defendant, further answering, upon knowledge, information and belief, denies that it has derived and received, or is still deriving and receiving from such alleged manufacture, use and sale of said alleged patented gas heaters, great gains and profits, or any gains and profits whatsoever, and denies that it continues to make, use and sell, or refuses to desist from making, using and selling said gas heaters, embracing the alleged invention as aforesaid described and claimed in said letters patent.

And this defendant, further answering, upon information and belief, avers that the alleged improvement in gas heaters or substantial and material parts thereof set forth and claimed as new in the said letters patent was not at the time of the assumed or pretended invention thereof by the said Hiram Y. Lazear a subject-matter of invention, nor a novelty proper to be secured by the grant of valid letters patent within the meaning and intent of the statute of the United States in such case made and provided, and further avers that the same is of no practical value for the purposes therein specified, and possesses no utility whatsoever.

And this defendant, further answering, upon information and belief, avers that the said Hiram Y. Lazear was not the original and first inventor of the whole or any substantial and material part of the things set forth and claimed as new in said letters patent, and specified in said bill of complaint, but that prior to said alleged invention or discovery thereof the same had been described and set forth in the following specified letters patent of the United States, and known to and used by the several patentees therein named at the places of their respective residences as hereinafter stated, that is to say:

No. 28781, dated June 19th, 1860, and granted to William F. Shaw, of Boston, Massachusetts.

12 No. 38018, dated March 24th, 1863, and granted to James M. Dick, of Buffalo, New York.

No. 66911, dated July 16th, 1867, and granted to D. C. Teller, of Terre Haute, Indiana.

And this defendant, for the reasons hereinbefore recited, submits that it ought not to be decreed to account for and pay to the complainant any gains and profits or damages whatsoever, nor to be enjoined as in the complainant's bill is prayed, but without admitting that any other matter contained in the said bill of complaint material to be answered unto, and not herein already sufficiently answered, is true to its knowledge or belief, submits that the complainant is not entitled to any relief whatsoever against it. All of which this defendant is ready to aver, maintain, and prove, as this honorable court shall direct, and prays to be hence dismissed with reasonable costs and charges in this behalf most wrongfully sustained.

DOVER STAMPING CO.,
By L. BACON FOSS, *Manager.*

GEO. L. ROBERTS & BROS.,
Of Counsel.

DISTRICT OF MASSACHUSETTS,
County of Suffolk, ss:

At Boston, in said county, on this 30th day of June, A. D. 1876, personally appeared the above L. B. Foss, manager of the Dover Stamping Company, and made oath that the foregoing demurrer and answer

is true so far as made upon his own knowledge, and so far as made upon information and belief that he has been informed and believes it to be true.

Before me.

ELIAS MARWIN,
U. S. Commissioner.

13 On the seventh day of August, A. D. 1876, the following replication to answer was filed:

Replication.

The replication of James L. Sharp, complainant, to the answer of the Dover Stamping Company, defendant.

This repliant, saving and reserving unto himself now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says, that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

THOS. L. LIVERMORE,
Complainant's Solicitor.
A. v. BRIESEN,
Of Counsel.

14 This cause was thence continued from term to term to the May term, A. D. 1877, when, on the twelfth day of June, the following petition for leave to amend bill was filed, namely:

Petition for leave to amend bill.

To the honorable the judges of the circuit court of the United States within and for the district of Massachusetts:

The humble petition of the plaintiff showeth that your petitioner, having exhibited his bill in this honorable court against the defendant, The Dover Stamping Company, who has appeared and put in answer, and that your petitioner is advised to amend his said bill, but he does not require any further answer from the defendant.

Your petitioner, therefore, humbly prays that he may be at liberty to amend his bill as follows: By inserting therein at the foot of the 4th page of the printed record the following: "and damages which
15 the said William Phillips and your orator have sustained, or are entitled to recover, by reason of or for the aforesaid infringement, to the amount of ten thousand dollars."

By his solicitor:

THOS. L. LIVERMORE.

And thereupon the said petition was allowed by the court, and the bill of complaint was amended accordingly.

The cause thereupon came on to be heard upon the pleadings and proofs and arguments of the counsel for the respective parties, and was fully heard by the court, and was thence continued under advisement to this present term, and now, to wit, February 4, 1878, it is ordered, adjudged, and decreed by the court that the bill of complaint in this cause be, and the same is hereby, dismissed, with costs for the defendant, taxed at eighty-four dollars and ninety-five cents.

16 From this decree the said complainant in open court claims an appeal to the Supreme Court of the United States, and gives good and sufficient security that he will prosecute the said appeal to effect, and answer all damages and costs if he fail to make his plea good, and said appeal is allowed accordingly.

A true record.

Attest:

JOHN G. STETSON, *Clerk.*

17 The following is the evidence used in the hearing of said cause before said circuit court, namely:

EVIDENCE FOR COMPLAINANT.

United States circuit court, district of Massachusetts. In equity.

JAMES L. SHARP
vs.
THE DOVER STAMPING CO.

Deposition de bene esse, taken at New York, September 19, 1876, before Ernest C. Webb, notary public, pursuant to notice, of which due service is admitted.

Present, John L. S. Roberts, esq., counsel for defendant, Arthur V. Briesen, esq., counsel for complainant.

Counsel for defendant objects to the taking of testimony before the demurrer filed in said cause has been heard and determined by the court.

Counsel for complainant denies that there was a demurrer filed in this cause, and states that the thing purporting to be a demurrer has been sufficiently noticed for argument, and will be argued at the final hearing of this cause if desired.

Counsel for complainant offers in evidence letters patent of the United States, numbered 79989, dated July 14, 1868, and granted to Hiram Y. Lazear, for an improvement in gas heaters, and the same is marked Complainant's Exhibit No. 1, Sept. 19th, 1876, E. C. W., notary.

18 Counsel for complainant also offers in evidence assignment from Hiram Y. Lazear to William Phillips, dated March 14th, 1871, and recorded March 18th, 1871, in liber Z 13, page 112, transfers of patents, and the same is marked Complainant's Exhibit No. 2, Sept. 19th, 1876, E. C. W., notary.

Counsel for complainant also offers in evidence assignment from William Phillips to James L. Sharp, bearing date April 29th, 1876, and recorded May 3d, 1876, in liber R 20, page 59, of transfers of patents, and the same is marked Complainant's Exhibit No. 3, Sept. 19th, 1876, E. C. W., notary.

JAMES L. SHARP, a witness called in his own behalf, being duly sworn, deposes and says:

Q. 1. What is your name, age, residence, and occupation?

A. James L. Sharp; I am 45 years old; I reside at 198 Sixth avenue; I am a member of the firm of James L. Sharp & Co., manufacturers of gas and oil stoves, tin-ware, patent iron-holders, steak-broilers, etc., at 198 Sixth avenue.

Q. 2. Since when have you manufactured steak broilers, and under what patent, if any?

A. Since 1868, under H. Y. Lazear's patent, Complainant's Exhibit No. 1.

Q. 3. Look at the article now shown you and state what it is, and also of whose manufacture it is, if you know?

A. It's a steak broiler; it is manufactured by the Dover Stamping Company, I suppose. It looks as though it was, because I have seen the same thing in their place of business in Boston.

Q 4. Did you carefully examine the broilers which you saw at the establishment of the defendant, and did you find the same in every respect like the broiler now before you?

A. I did.

Q. 5. When did you so examine the broilers of the defendant?

A. In April, 1876.

Q. 6. How do you know that the defendant manufactures broilers of this construction?

A. By seeing them in its place of business, seeing them exposed for sale, and by the admission of Mr. Foss, the manager of the Dover Stamping Company.

19 Q. 7. As far as you know, does the defendant still make and sell the same?

A. They do.

Q. 8. Have you read and do you understand the patent, Complainant's Exhibit No. 1?

A. I have and do.

(The broiler shown the witness is offered in evidence by counsel for complainant, and marked Complainant's Exhibit No. 4, Sept. 19th, 1876, E. C. W., notary.)

Q. 9. Please compare the broiler, Exhibit No. 4, with the broiler described and claimed in the patent, Exhibit No. 1, and state whether or not you find the former described in the latter; and give your reasons for any statement which you may make?

A. I find them of very similar construction, virtually the same thing. The broiler has the outer wall or casing, and the V shaped trough with a non conducting filling, and the wire broiler part for holding the steak, and a pan for catching the gravy.

Q. 10. Please state in which of the claims of the patent, if any, you find the broiler, Exhibit 4, described.

A. In the first claim and in the third claim.

Q. 11. The patent describes a trough; which of the two V-shaped conduits or parts of the broiler, Exhibit 4, do you find to be the trough described in the patent, the lower or the upper?

A. The lower part of the V in the broiler.

Q. 12. And the upper V of Exhibit 4, how is that called in the patent? Quote from the patent what you find in reference to it.

A. I find it called a dripping-pan. Now I quote from the patent the following: "F represents a dripping-pan in which the bottom of the broiler rests, and which receives the fat or juices from the meat. The

dripping-pan F rests on plaster of Paris or other non-conductor of heat, *e*, with which the V-shaped trough E is filled or nearly filled, as seen, for the purpose of preventing the heat of the flame from burning the grease in the dripping-pan, and thereby preventing smoke in the operation of broiling."

Q. 13. The patent, Exhibit No. 1, appears to describe an apparatus for broiling steak by gas; state whether or not Exhibit No. 4 is an apparatus for broiling steak by gas?

A. Yes, it is.

Cross-examined by Mr. ROBERTS:

X Q. 14. Please explain what you understand to be the position and construction of the dripping-pan, Exhibit No. 1, and compare with the pan for catching the juices of the meat shown in Exhibit No. 4, stating how they agree or differ.

A. The dripping-pan in Exhibit No. 1 holds the wire broiler and catches the juices and gravy of the meat and holds them. I find them virtually the same in Exhibit No. 4; it catches the gravy and juices of the meat, except it doesn't hold them.

X Q. 15. Please state what you understand by the third claim in Exhibit No. 1, and how the same are shown in Exhibit No. 4?

A. I find in the claim "an apparatus for broiling steak by gas, whereby the steak is broiled or cooked simultaneously on both sides, or where the sides are equally exposed to the flame and heat, substantially as shown and described." I understand by the claim it means cooking a steak on both sides at the same time by gas or any other heat. It is shown in the same manner in Exhibit No. 4 by the wire broiler and V-shaped trough, and the casings and the filling or air space in the V trough.

X Q. 17. What do you mean by casings; and how many casings are shown and described in Exhibit No. 1, and how many in Exhibit No. 4, and explain what you understand to be the construction and functions of each?

A. I mean the outside walls of the broiler; there are two shown in Exhibit No. 1; in Exhibit No. 4 there is only one. It does not make much difference whether you make a double case or single case; we make them both ways. The difference is only the time in cooking; the double case cooks a little quicker than the single. The construction of Exhibit No. 1 is a casing made of sheet iron or tin, or any other suitable metal. The construction of the casings are both the same, only one is smaller than the other. The object is to form a cold-air space between the two casings, and make the inside case hold the heat more readily. The construction of the outside casing in Exhibit No. 4 is the same as that shown in Exhibit No. 1. The object is to hold the heat and cook the steak as described in Exhibit No. 1.

X Q. 18. Please compare Exhibit 4 with the device described in Exhibit 1, and state where they agree and where they differ, as you understand it.

A. They agree in the following points: 1st, with an outside casing, a wire holder for holding the steak, a V-shaped trough with a filling and cover top of the broiler. All the difference that I can see in them is virtually that Exhibit 4 is round and Exhibit 1 is oval.

X Q. 19. Have you ever testified as an expert in any other patent cause; if so, in what?

A. I never did.

X Q. 20. Please state what you understand to be the function of the V-shaped trough shown and described in Exhibit 1.

(Objected to, as Exhibit 1 explains the function.)

A. I understand it to be for dividing the flame or heat, and preventing the steak from being burnt.

X Q. 21. What do you understand to be the function of the V-shaped trough shown in Exhibit 4?

A. I understand it to be, to divide the flame or heat so as to cook the steak on both sides at the same time, and prevent the steak from being burnt.

Redirect examination by Mr. BRIESEN:

R. D. Q. 22. State whether or not you find in the patent, Exhibit 1, any statement relating to the dripping-pan which shows that the juices received in the pan must be held therein.

(Objected to, as the patent shows for itself.)

A. I don't find anything.

R. D. Q. 23. What did you mean, then, in answer to question 14, when you stated that the pan in Exhibit 1 catches the juices and holds them?

(Objected to, as that is not all of his answer to question 14.)

A. I meant, that held all the juices from the steak that run down from the steak out of the wire holder.

R. D. Q. 24. And what, then, did you mean by stating that the pan in Exhibit 4 does not hold them? Hear answer and question 14 before replying.

A. I had got the V plate mixed up with the pan in answer 14.

R. D. Q. 25. Well, how would be your answer to X-question 14 now? Hear it read before replying.

22 A. It is to catch the gravy and juices of the meat; the position of the pan is on top of the V plate. Well, I find in Exhibit No. 4 the drip-pan is at the end of the V plate.

R. D. Q. 26. What do you call the sheet metal covering of the air space or filling in Exhibit 4?

A. I call it a portion of the drip-pan.

R. D. Q. 27. How does that portion of the drip-pan agree with or differ from the drip pan shown in Exhibit 1?

A. It agrees virtually the same, except it holds the drip all in one end.

R. D. Q. 28. In which end?

A. In the lowest end of the V trough.

R. D. Q. 29. What do you call the lowest end of the V trough?

A. I call the lowest end the open lower end of the V trough.

R. D. Q. 30. Please explain what you mean by saying the drip is all held in that lower end?

A. Because it inclines a little and the drip all runs towards the open lower end.

R. D. Q. 31. Now tell me whether in Exhibit No. 1 the drip trough inclines or not.

A. I believe it does not incline any.

R. D. Q. 32. What makes you believe so?

A. Because the V plate is intended to set level.

R. D. Q. 33. Tell me the fact, and not your belief on that point?

A. In Exhibit 1 it sets level.

R. D. Q. 34. What is the position of the drip-pan in Exhibit 1 in reference to the wire broiler or steak holder?

A. It sets directly under the steak as it is held in the broiler.

R. D. Q. 35. What is the position of the dripping-pan in Exhibit 4, in reference to the wire broiler or steak holder?

A. It sets directly under the wire broiler that holds the steak as it is held in the broiler.

R. D. Q. 36. In your answer to X-question 18 you did not make reference to the dripping-pan; state whether Exhibits 4 and 1 agree or differ in relation to their use of the dripping-pan.

A. They virtually agree.

R. D. Q. 37. Please quote from the patent the function of the V-shaped trough and filling, as described in the latter part of the specification.

23 A. The fat and juices are caught in the pan F, and protected from burning by the filling E'.

JAMES L. SHARP.

Subscribed and sworn to before me this 19th day of September, 1876.

ERNEST C. WEBB (No. 145),
Notary Public, N. Y. Co.

Complainant rests.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Ernest C. Webb, a notary public, duly commissioned and sworn under the laws of the State of New York, do hereby certify that the foregoing deposition of James L. Sharp was taken, subscribed, and sworn to before me this 19th day of September, 1876, pursuant to the annexed notice, de bene esse, and that counsel were present for the respective parties. I also certify that the reason for taking the foregoing deposition is that the said witness lives more than 100 miles distant from Boston, Massachusetts, the place of trial.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said suit named, nor in any way interested in the event of said cause.

In testimony whereof I have hereunto set my hand and affixed my official seal, this nineteenth day of September, 1876.

[NOTARIAL SEAL.] ERNEST C. WEBB (No. 145),
Notary Public, N. Y. County.

24 Circuit court of the United States, district of Massachusetts. In equity.

JAMES L. SHARP
vs.
THE DOVER STAMPING CO.

Consent is hereby given that William H. H. Andrews, esq., of Boston, counsellor at law and notary public, be appointed by the court, to be special examiner in the above entitled cause, to take the evidence introduced therein on behalf of the defendant, under and pursuant to the sixty-seventh rule in equity, as amended.

Dated at Boston, April 6th, 1877.

JOHN L. S. ROBERTS,
Solicitor for Defendant.
A. v. BRIESEN,
Of Counsel for Complainant.

EVIDENCE FOR DEFENDANT.

JAMES L. SHARP
vs.
THE DOVER STAMPING CO.

Taken pursuant to the sixty-seventh rule of the Supreme Court of the United States, in equity, as amended.

Before me.

WM. H. H. ANDREWS,
Special Examiner.

BOSTON, *April 6th*, 1877.

25 *Deposition of William F. Shaw.*

Direct examination by JOHN L. S. ROBERTS, Esq., of counsel for defendant:

Int. 1. State your name, age, residence, and occupation.

A. William F. Shaw; 56 years of age. I reside at Boston, and am a manufacturer and inventor of gas stoves. My place of business is at No. 24 Kneeland street, Boston.

Int. 2. How long have you been engaged in the manufacture of gas stoves?

A. Previous to the year 1855. I can't tell how long previous. That is when I commenced, and I have been in the business up to the present time.

Int. 3. What other articles or devices connected with gas stoves, if any, have you invented and manufactured?

A. I don't understand the question.

Int. 4. I refer to devices for cooking as well as heating by gas?

A. I have invented devices or articles for boiling, roasting, frying, and for laboratory uses.

Int. 5. Whether or not you have also invented and manufactured devices for broiling by the burning of gas, in addition to those already mentioned?

(Counsel for complainant objects to the question as leading, and objects also to any evidence of this witness other than the identification of his patent, No. 28781, dated June 19, 1860, on the ground that the name of the witness has not been mentioned in the defendant's answer as that of a person having prior knowledge of the thing patented by the assignor of complainant's patent, and as therefore his production as such witness is a complete surprise to the complainant, and not in accordance with law.)

A. I omitted adding the broiling, as I understood the question to be what other inventions besides broiling.

(Same objection, and notice is given that at the hearing of this cause a motion will be made to strike out and disregard all evidence
26 of this witness relative to any alleged prior knowledge on his part of complainant's patented device, on the ground that the name of the witness does not appear in the answer except as patentee in manner stated in previous objection.)

Defendant offers in evidence letters patent granted to William F. Shaw, No. 28781, dated June 19, 1860, for the term of fourteen years from said date, a copy of which is marked Defendant's Exhibit A, W. H. H. A., Special Examiner.

Int. 6. Please examine said letters patent, and state whether you are the William F. Shaw therein mentioned as inventor of the things therein set forth and shown.

A. I am.

Defendant offers in evidence a steak-broiler, marked Defendant's Exhibit B, W. H. H. A., Special Examiner.

Int. 7. Please examine Defendant's Exhibit B, and state what it is and its use, and by whom manufactured, and in accordance with what letters patent, if any, is made.

(Same objection.)

A. It is a gas steak-broiler. Its use is for broiling meats, fish, and for toasting. It was manufactured by me, W. F. Shaw, in accordance with letters patent No. 28781, dated June 19, 1860. The furnace connected with the device was patented Feb. 26, 1856. There are various patterns of furnaces to which I apply the broiler.

Int. 8. Please state whether or not you find described in letters patent No. 28781, Exhibit A, a drip pan or gravy receiver for catching and holding the juices of the meat, and whether the same is shown and appears in Exhibit B, and designate how it is marked in the drawings.

(Objected to, as Exhibit A speaks for itself.)

A. I do find a drip pan in Exhibit A, marked C in the drawings, and it is shown in Exhibit B; it is attached to the lower part of the broiler front.

27 Int. 9. Please state whether or not in said steak broiler the meat, when introduced therein, is broiled upon both sides at the same time without turning; and, if so, how that is accomplished.

(Objected to as leading and suggestive, and as seeking to go beyond the patent, Exhibit A.)

A. Yes, sir; it is. It is accomplished by drawing the wire frame forward and allowing the heat to circulate back. The heat from the gas burner is deflected by a plate in the upper part of the broiler, a passage being left at each end of the plate so as to direct a portion of the heat to the back part of the steak.

(Counsel for complainant objects to the reference to any alleged passage at each end of the upper deflecting plate, on the ground that such passage is not shown in the patent, Exhibit A, but that, on the contrary, said patent states the upper deflecting plate to be arranged like the lower deflecting plate, which is specified and shown to extend entirely across the heating chamber, "from end to end thereof.")

Int. 10. When were the broilers made by you with a passage open at each end of the upper deflecting plate, as mentioned by you in your preceding answer?

(Objected to as seeking to go beyond the patent, Exhibit A, and objected to also on the ground mentioned in the objection to the question and answer No. 5.

Defendant's counsel says that there is no such language or description in the letters patent in regard to the upper deflector as mentioned above by complainant's counsel, but that the language quoted refers to the lower deflector.

Counsel for complainant refers to figure 3 of the drawing, Exhibit A, and to the following words in the specification: "Over the said deflecting plate I arrange another deflector, or plate R, and in manner or with respect to the first as shown in the drawings.")

28 A. I have no recollection of having made them in any other way; I might have done it, but I have no recollection of it. They were probably made in the year 1860.

(Latter part of answer objected to on the same ground as mentioned in objection to question and answer No. 5.)

Int. 11. In using the broiler, Exhibit B, whether or not the juices or gravy of the meat collected in the dripping pan is burnt or lost?

(Objected to as leading.)

A. No. They are protected by an air space under the drip pan, allowing the air to circulate under these.

Int. 12. Whether or not, prior to the time when you made said broiler like Exhibit B, you had made other broilers of different construction in relation to protecting the juices collected from burning; if so, please describe them?

(Same objection as to question and answer No. 5.)

A. I had. I substituted the Waterman broiler front for the present one, which was afterwards patented by me, Exhibit B. In a broiler previously made, I substituted Waterman's patent broiler front. Previously I used the Waterman broiler front for about four years previous to June 19, 1860, the date of Exhibit A. I should have said, used the Waterman broiler front instead of using the word "substituted."

(Same objection, and because defendant's answer does not refer to Waterman's broiler or Waterman's patent, or to any prior knowledge with respect to Waterman.)

Int. 13. Please describe any broiler made by you prior to the date of said patent, Exhibit A, which had a different arrangement for protecting the juices of the meat caught in the dripping pan from burning, from that shown in said patent and said Exhibit B.

(Same objection.)

29 Defendant offers in evidence a gas cooking arrangement marked Defendant's Exhibit C, W. H. H. A., special examiner.

(Same objection.)

A. I had a disk filled with plaster of Paris and hard coal ashes; the drip-pan was placed over this disk on supports, which allowed a passage of air under the drip-pan; the meats were suspended over the pan, held in place by hooks.

(Same objection.)

Int. 14. Please examine Exhibit C, and state what it represents, and by whom made.

(Same objection.)

A. It represents an apparatus for cooking food of various kinds by gas, and was made by me.

Int. 15. About when did you first make such device?

(Same objection.)

A. As near as my recollection serves me, I think it was about the year 1856.

(Same objection.)

Int. 16. For what purpose was it made by you?

(Same objection.)

A. For cooking food.

Int. 17. Whether or not for broiling meat and fish?

(Same objection, and as leading.)

A. I did, for that and other purposes, cooking food generally.

Int. 18. State whether or not they were used for broiling meats and fish, and sold by you for that purpose.

(Same objection.)

A. They were sold by me for that purpose, and I presume they were used for that purpose.

30 Int. 19. Whether or not the meat or fish was broiled or cooked simultaneously on both sides, in said device?

(Same objection, and as it does not appear that the witness has any knowledge on that point.)

A. It was.

Int. 20. Whether the juices were saved; if so, how; and whether prevented from burning; if so, how, in said device?

(Same objection.)

A. They were saved by the drip-pan, and protected in the manner described previously in answer to int. 13.

Int. 21. Please state what changes, if any, you afterwards made in said device, and more especially in regard to the deflector or disk which protected the juices from burning.

(Same objection.)

A. Such as shown in Exhibit B. I made other inventions to other portions of the work. As to the disk, I omitted the filling of plaster of Paris in applying it to other inventions. I don't recollect altering that of Exhibit C.

Int. 22. Please state what changes or alterations were made by you in this device, and what other devices having the same object as that or Exhibit C were made after that up to the time when you made Exhibit B, for which letters patent were granted.

(Same objection, and as the witness has stated that he made no changes in Exhibit C.)

A. That stove was sold as it is; after that followed other inventions for cooking purposes. There were quite a number of patterns; I can't describe them. I have some of the drawings which I produce, marked Exhibits D, E, F, G, H, I, K, and L, W. H. H. A., Special Examiner.

Int. 23. When were these drawings, Exhibits D to L, inclusive, printed?

(Same objection.)

A. Last night, between four and five o'clock, April 5, 1877.

31 Int. 24. From what were they printed?

(Same objection.)

A. From cuts which I have here.

Counsel for defendant here offers the cuts for examination of counsel for complainant.

Int. 25. By whom were these cuts made, and when?

(Same objection.)

A. I presume they were made by Ward; I don't know his initials; he went off to the war, and I have never heard of him since. They were made between 1856 and 1860, as near as I can recollect. They were not all made at the same time.

Defendant now puts in evidence a drawing marked Exhibit M, W. H. H. A., Special Examiner.

(Same objection.)

Int. 26. When was the block or cut made, from which this drawing, Exhibit M, was printed and by whom?

(Same objection.)

A. To the best of my recollection, about the year 1856. It was made by Mr. Ward.

Int. 27. Where has this block and the others mentioned in the answer to int. 24, been kept since they were made by Mr. Ward, as you have stated?

(Same objection.)

A. They have been kept, with several hundred others, in a case of drawers on my premises.

Int. 28. You have stated that Exhibit C represents the first pattern of a gas cooking stove which was constructed by you for broiling or cooking meat. Will you now point out the other devices afterwards constructed by you in regular succession, if you can, and you may refer to the drawings already put in evidence in giving your answer?

(Same objection.)

32 A. As near as my recollection serves, as follows: Exhibits D, F, with its broiler shown on Exhibit I and K; H, with its broiler as shown on Exhibit G and L; Exhibit E was made about the same time as Exhibits D, F, and I.

Int. 29. Please state the construction of the broiler as shown in Exhibit I, made by you as before stated.

(Same objection.)

A. Very similar to Exhibit B, with the exception that it has a box front instead of a flat front, as shown in Exhibit B.

Int. 30. Whether or not there was a dripping-pan, and if so, how protected?

(Same objection, and as leading.)

A. The dripping-pan formed the lower portion of the box front. The bottom of the pan rested on the edge of the casting in the top of the stove, so that the air would pass under it.

Int. 31. Whether or not that protected the gravy of the meat from burning?

(Same objection.)

A. It did. The broiler I was also used with the stove K.

Int. 32. Whether or not broilers were made by you like Exhibit G; if so, what was the construction?

(Same objection.)

A. The drip-pan rested on projections like those shown in Exhibit B. The broiler front was of the same construction as Exhibit I. Broiler G was on a larger scale, run with four burners, whereas Exhibit I run with one burner.

Int. 33. Whether or not in those broilers shown by Exhibit I and Exhibit G meat was cooked at the same time on both sides over burning gas?

(Same objection.)

A. It was. Directions were almost always given by me or my salesmen, not to disturb the process of cooking, but to let it remain without turning until it was cooked.

Int. 34. In Exhibit C what is the function or purpose of the dish filled with plaster of Paris and hard-coal ashes?

(Same objection, and as already answered.)

33 A. That was answered this forenoon. It was to distribute the heat and prevent it from concentrating in one place. I called it a heat deflector.

Int. 35. Whether or not it also served to protect the bottom of the dripping pan from becoming so heated as to burn the gravy or juices of the meat caught therein?

(Same objection, and as leading.)

A. It did.

Int. 36. Whether or not in an apparatus made like Exhibit C, the meat cooked or broiled therein was equally exposed to the heat and flame of the burning gas upon all sides at the same time?

(Same objection, as already answered.)

A. Yes.

Int. 37. Whether or not meat was cooked or broiled in a device like Exhibit C, by you at or about the time when first made and before being sold or offered for sale?

(Same objection, as leading.)

A. Yes, sir.

Int. 38. Where were these made and sold or offered for sale?

(Same objection.)

A. They were offered for sale on Washington street, opposite Bromfield street, in Boston. Some parts were made on my own premises, and some in Roxbury. Castings were made in Roxbury.

Cross-examination, de bene esse, by A. V. BRIESEN, Esq., counsel for complainant:

X Int. 39. When was Exhibit C made; that particular one?

A. It has been made within two months.

X Int. 40. Why did you make it?

A. I received an order to me from L. B. Foss, the superintendent of the Dover Stamping Company, and Thos. W. Clarke, their attorney.

X Int. 41. Did you understand the object for which it was made by you?

A. I was told it was to be used in an infringement suit.

34 X Int. 42. When last did you make anything like Exhibit C?

A. As near as my recollection serves me, before 1856.

X Int. 43. Does the picture, Exhibit M, correctly and fully illustrate the articles of that kind made by you in 1856?

A. It does not fully illustrate it. It is not all here; parts are not all shown. It was not designed for a working pattern, but only as an advertisement giving a general idea.

X Int. 44. Did you ever print advertisements from the block from which Exhibit M was made, and if so, where and when, and how many?

A. So long time since, I can't answer that question, my memory don't serve.

X Int. 45. Will you positively swear that such a thing as Exhibit C has actually been used for broiling meat, in the year 1856?

A. I won't swear to the year. I will swear to its having been used by myself for broiling meats previous to 1856; I will swear to that.

X Int. 46. Where did you broil meat in it and in whose presence?

A. On my own premises on Washington street, opposite Bromfield street, Boston. In whose presence I can't name, my memory don't serve.

X Int. 47. Give me the names of all your employees in 1856.

A. I can't do it; my books are destroyed.

X Int. 48. How about your memory?

A. I can't remember who I had with me 22 years ago.

X Int. 49. Do you remember whom you had with you in 1860?

A. No, I don't.

X Int. 50. Why were your books destroyed?

A. I destroyed them because I thought I should not want them any more.

X Int. 51. When did you destroy them?

A. I don't know the year; it was when I was in my store next to the Adams House; I don't remember what year that was; I moved from there into smaller quarters, and I did not want to be lumbered with more then was necessary.

X Int. 52. Since when have you been at 24 Kneeland st.?

A. I have been there 4 or 5 years; I don't remember the date I moved there.

(The witness now looks at a memorandum book to refresh his
35 recollection, to which counsel for complainant objects, on the ground that it interferes with his cross-examination, which is intended to test the memory of the witness. Counsel for complainant requests the officer to instruct the witness that he should not refer to any written memoranda while under cross-examination, and gives as his reason for such request, that the principal object of the cross-examination is to test the memory of the witness.

Counsel for defendant instructs the witness to refer to any memorandum book to fix dates when questions are put relative to same, and also whenever he desires, and also protests that it is not within the province of the magistrate to instruct witness as requested above.

The magistrate decides that it is not within his province or power to instruct the witness as requested by the counsel for complainant.)

The witness, after looking at his memoranda book, further answers and says:

June 17, 1872, I took possession of 24 Kneeland street.

X Int. 53. Where were you immediately before that?

A. At Wardman's on Washington street, opposite Union Park street. I have forgotten the number of the street.

X Int. 54. Where were you immediately before that?

A. Lincoln street, corner of Kneeland.

X Int. 55. Where immediately before that?

A. Washington opposite Bennett street.

X Int. 56. When did you leave Washington street opposite Bromfield?

A. Can't answer it.

X Int. 57. Why can't you answer?

A. Don't recollect.

X Int. 58. About when did you leave there?

A. I can't answer.

X Int. 59. Have you no idea when, about, you left there?

A. No, sir.

X Int. 60. Was it before the war broke out that you left there?

A. Yes, sir.

36 X Int. 61. Long before?

A. I can't answer.

X Int. 62. What became of Mr. Ward who made your cuts?

A. He told me he was going into the war the last time I saw him, that was when the war first broke out.

X Int. 63. Did I understand you to say that you obtained a medal for exhibiting at a certain fair the thing illustrated on Exhibit L?

A. That was among the goods exhibited at that time.

X Int. 64. Have you that medal here, and will you read the date of it?

A. I have and will. The date is 1856.

X Int. 65. Exhibit L has printed upon it the following words: "W. F. Shaw's aerified gas stove, patented Jan. 23, 1865." Will you still swear that you exhibited that in 1856?

(Counsel for defendant objects, because counsel for complainant reads the year on said exhibit as 1865, when it appears that it is 1855.)

A. Yes, sir; that was exhibited with the goods at the fair at the date of the medal.

X Int. 66. Did you also exhibit at that fair anything like Exhibit M; f not, why not?

A. I did not exhibit the identical one shown in Exhibit M, but ones made after the same principle. You will find some of the ideas in D, and F, and H, and L. From M come most of my inventions for cooking, up to this date.

X Int. 67. What is Exhibit D?

A. D is a cooking apparatus; it can also be used for a heating apparatus; it is used also for broiling and baking. The lower portion of I and D are alike.

X Int. 68. Does Exhibit D have a dripping pan?

A. Yes, when the broiler is in its place.

X Int. 69. As a matter of fact I want to know whether, in the thing shown in Exhibit D, there is a dripping pan. I will ask you about the broiler afterwards.

A. It represents the broiler furnace without the broiler.

X Int. 70. The same answer applies to Exhibit E, does it not?

A. No, sir; it has nothing to do with the broiler; it is an apparatus for heating flat-irons, water, coffee, and simple operations.

37 X Int. 71. Please describe the broiler which is illustrated in Exhibit H.

A. This is merely the furnace without the broiler on it; without the broiler in its place.

X Int. 72. Is there a broiler in Exhibit F?

A. No, sir; merely a place to put one; the furnace to hold one.

X Int. 73. There is no broiler shown in Exhibit L, is there?

A. No, sir; merely a place to put one.

X Int. 74. Is there a broiler shown in Exhibit K?

A. No, sir; but a furnace to hold one.

X Int. 75. When did you first conceive of the deflecting shields, which are shown in Exhibits B and A?

A. I think between the years 1856 and 1860; it might have been previous to 1856.

X Int. 76. You spoke about the Waterman patent; was that a steak broiler or was it a foot warmer?

A. If I had meant a foot warmer, I should have said a foot warmer; it was a steak broiler.

X Int. 77. Please describe the Waterman steak broiler as near as you can.

A. It was a flat box with a drip pan in the lower part. The steak was held by a wire holder, similar to the one in Exhibit B. His was made to use in front of a range. It didn't have any broiler back as shown in Exhibit B.

X Int. 78. Was it a hollow box? I mean hollow at the front.

A. How could a box be otherwise than hollow at the front?

X Int. 79. Then as I understand you, the Waterman broiler was composed of a vertical side or cover, a steak holder, and a drip pan, the vertical side or cover enclosing an air space; is that it?

A. No, sir; the sides and back were one thickness, not double like that shown in Exhibit B.

X Int. 80. But you have just stated that it was a hollow box at the front, have you not?

A. What I mean was the same as this drawer is hollowed; I don't mean that it is double bottomed.

X Int. 81. Then it was not hollow at the front, was it?

A. It was open at the front.

X Int. 82. When did you first get up the style of handle shown in Exhibit B?

A. I don't know; probably when the broiler was first made.

38 X. Int 83. How long before applying for your patent Exhibit A, had you made and sold articles involving the invention described in that patent?

(Objected to, on the ground that when he applied for said letters patent, he then swore that the said invention or improvement was new, and had not been in public use or on sale with his consent, knowledge, and allowance, for two years prior thereto, as will appear from said application, and also because the same is immaterial, irrelevant, and not in cross-examination of any statement made by witness.)

A. I can't answer; I don't recollect.

X Int. 84. Did the broiler shown in Exhibit I have deflecting plates of the kind shown in Exhibit B?

A. As near as I recollect they are very similar; the lower one is attached in a different way from Exhibit B. It think it was attached to the bottom part of it, riveted to the front and bent over. By front in this answer, I mean the part that enters the furnace.

X Int. 85. Did it have a hollow removable front or cover enclosing an air space?

A. I don't understand the question. It is hollow as this drawer is hollow. It has no double bottom or back enclosing an air space.

X Int. 86. Did the broiler shown in Exhibit G have a hollow removable cover enclosing an air space?

A. It is made like the one I have just described on a larger scale.

X Int. 87. Did Exhibit G have the arrangement of a steak holder, broiling chamber, and a burner or burners when in use?

A. There was a steak holder and drip pan, and a broiling chamber similar to Exhibit B, and when in use it had four burners underneath.

X Int. 88. Now answer the same question with respect to Exhibit I.

A. It had a steak holder and drip pan and a broiling chamber, similar to Exhibit B, but not so deep; one burner was used under this.

Adjourned.

April 7, 1877.

X Int. 89. When first did you see Exhibit M, and who had it printed?

39 A. To the best of my recollection within the last three months. I don't know who printed it, but I loaned the block to Mr. L. B. Foss, of the Dover Stamping Co.

WILLIAM F. SHAW.

Attest: W. H. H. ANDREWS, Special Examiner.

Deposition of Albert W. Brown.

Direct examination by JOHN L. S. ROBERTS, esq., of counsel for defendant:

Int. 1. State your name, age, residence, and occupation.

A. My name is Albert W. Brown, 36 years of age. I reside in Boston, and am by occupation a solicitor of patents and an expert in patent causes.

Int. 2. Whether or not you are accustomed to examine and compare mechanical contrivances and devices, with a view to ascertain their similarities and dissimilarities of construction and operation, and please state the extent of your experience as an expert in patent causes?

A. I am. As an expert in patent causes I have for the past eight or

nine years been engaged and testified in various causes before the U. S. circuit court of this district and in the U. S. Patent Office.

Defendant offers in evidence a printed copy of letters patent granted to D. C. Teller, of Terre Haute, Indiana, dated July 16, 1867, and numbered 66911, and marked Defendant's Exhibit O, W. H. H. A., Special Examiner.

Int. 3. Have you examined letters patent No. 28781, dated June 19, 1860, granted to Wm. F. Shaw, and letters patent No. 66911, dated July 16, 1867, granted to D. C. Teller, and letters patent No. 79989, dated July 14, 1868, granted to H. Y. Lazear, and do you understand the structure and operation of the things therein described and set forth; if so will you please point out and mention the principal operative parts of the broilers therein described and shown, and state what are the functions of each, and in connection therewith you may refer to Exhibits B and N.

Defendant offers in evidence a broiler made in accordance with the specification and drawings of letters patent No. 79989, dated July 14, 1868, granted H. Y. Lazear, and marked Defendant's Exhibit N, W. H. H. A., special examiner.

40 A. I have examined the several letters patent referred to, and I think I understand the construction and operation of the contrivances described therein. Beginning with the said Shaw patent, I find the contrivance or implement therein described and shown, to be an apparatus for broiling or roasting articles of food, such as steaks, etc., by gas or hydrocarbon vapors, and I find this apparatus, as described and shown, to consist of an enclosed chamber, which is open at its lower end and there arranged over an apparatus adapted for the burning of gas. This chamber I find to be provided with the following elements or parts, to wit: A broiler made of wire in two parts, hinged together along one side of each part, and otherwise made as broilers for broiling steaks are now commonly made, and as well known at the date of said patent. This broiler is placed in an upright position within the said chamber, and by its lower edge rests upon the bottom of a pan, which is another of the elements or parts within said chamber, and that this pan in turn rests upon a bottom part of said chamber, which is located at and along one side of the opening to which I have before referred as being at the lower end of said chamber. Below the pan and within said bottom of the chamber, I find a space which is open along one side of said bottom to the atmosphere about the casing, which makes the chamber to which I have referred. There are also two deflections arranged within said chamber, one at its lower opening and the other at its upper end, the latter being so arranged as to deflect in a downward direction and toward the position of the broiler within said chamber. The function of the chamber to which I have referred, is to receive the products of combustion and heat from the burning gas flames in the gas stove below, and to cause them, by enclosing and holding them therein, together with the action of the upper deflector within the chamber, to be thrown and to be made to act upon the material, whatever it may be, which is held by the broiler, located as I have stated in said chamber, the function of this broiler being to hold the steak or other material to the action of the heat. The function of the pan is to catch and hold the drippings of fat and other juices which may come from the steak while being acted upon by the heat, &c., within the chamber, as I have stated, and the function of the open air space within the bottom of the broiling or cooking chamber, although not described nor particularly referred to in the specification, would be, and is, in fact, to keep the pan compara-

tively cool, and thus prevent the drippings in the pan from being
41 burned by the heat from the gas flames of the gas apparatus.
The function of the upper deflector is to diffuse and to more thoroughly concentrate the heat within the chamber against all sides of the steak being cooked, so that both sides of the steak will be cooked simultaneously and substantially equally.

In the Teller patent, I find the apparatus or implement there described and shown to be a broiler for broiling steaks and toasting bread, &c., and that this apparatus consists of a chamber, in which are a series of upright pins, fixed in position about and around a central opening at the lower end of said chamber, and that said pins are surrounded by an annular open space at the lower end of said chamber. This chamber is closed at the top, and is there provided with a downward projecting conical shaped deflector, which is within the upper portion of the said pointed pins.

The chamber and the pins in this contrivance or implement perform the same functions which I have described and referred to as being performed by the chamber and the hinged-wire broiler of the Shaw patent, and the deflector in the upper portion of the chamber serves to deflect the heat, &c., within the chamber against the steak, which is impaled or held upon the upper pointed ends of the said pins.

The opening within the circle of the fixed pins and the annular opening about them, cause the heat coming from the heating apparatus employed to be applied to both sides of the steak at the same time. There are, also, two movable cross pieces or plates, D. D., shown in this patent, for the purpose of toasting bread.

In the Lazear patent I find the apparatus or implement there described and shown, to be an apparatus or implement for broiling meats or steaks, &c., by gas or over a gas stove. This apparatus consists of an enclosed casing, making a chamber substantially the same as the chamber of the Shaw and the Teller patents, and also to consist of a hinged wire broiler, located within said chamber in an upright position, and at rest upon the bottom of a pan, which, in turn, rests upon a bottom piece at the lower end of said chamber. This bottom piece or "trough E," as it is called, is provided with a non-conductor of heat, such as plaster of paris, and is arranged so as to leave an open space along each of its sides, which open spaces communicate with the heat from the burning gas or gas stove on which the apparatus is to be placed when used. The chamber, the hinged wire broiler, the
42 pan and the bottom piece or "trough E," with its plaster of paris construction of the Lazear apparatus, perform the same functions as those I have described and referred to as performed by the chamber, the hinged wire broiler, the pan and the open bottom piece in the apparatus of the Shaw patent; but with this addition, that the "trough E," of Lazear patent, is formed in such manner as to divide and separate the products of combustion, &c., as they enter the chamber, so that they will be made to act at once upon both sides of the steak held by the broiler, and this is substantially the same as the function performed by the central and annular openings which I have referred to as being found in the Teller patent. Exhibit B is a representation of the apparatus of the Shaw patent, and Exhibit N is a representation of the apparatus of the Lazear patent.

Int. 4. Please compare the model, Exhibit C, with the contrivances of the three patents you have just testified about, stating its resemblances and differences to each, respectively, and before doing so please listen o the deposition of Wm. F. Shaw in this case.

(Counsel for complainant objects to all references to Exhibit C, on the ground stated in his objection to question and answer No. 5 of Shaw's testimony, and objects also to the reading of Shaw's testimony to this witness as unnecessary and immaterial, and as it is not proper to influence the professional opinion of this expert witness by the statements made by the other witness. After reading the deposition of Wm. F. Shaw, referred to, the witness answers and says:)

A. Model Exhibit C shows an enclosed chamber which is open at its lower end, and there provided with a bottom piece of a conical shape. This bottom piece is suspended within the chamber with its apex downward and its base upward, and in a horizontal position, and it is of such size relative to the internal diameter of said chamber as to leave an annular space between the edge of its base and the inside surface of the casing which makes the chamber. The model, Exhibit C, does not show the internal construction of this conical shaped bottom piece, but from the deposition of Wm. F. Shaw I find that he there describes it to have been filled with plaster of paris and hard-coal ashes. Above this
43 bottom piece there is a pan which rests upon two cross pieces of the chamber, leaving an air space between it and the said bottom piece. In the upper portion of the enclosed chamber I find a series of hooks from which, as stated by said Shaw in his deposition, I infer the meats were to be suspended, from the words, "the meats were suspended over the pan, held in place by hooks," in his answer to direct interrogatory No. 13. And I find from said deposition of Shaw, in his answer No. 14, that this model "represents an apparatus for cooking food of various kinds by gas." There are other matters of detail construction shown by model Exhibit C, but as I understand the matter in controversy to be, they have no material connection with it, and therefore I will not refer to them, except to state that there is a door or means provided by which the chamber can be opened and closed at pleasure, for the removal or insertion of articles, and for examination of the cooking operations that go on in the chamber.

This model, Exhibit C, resembles the contrivances of the said Shaw patent in these particulars: first, in its enclosed chamber; second, in its dripping pan; and, third, in its holding of the meat being cooked above the pan; and also resembles substantially by its filled bottom piece the open chambered bottom piece of said patent. It differs from the contrivances of the said patent in the form of its device for holding the steak to the action of the heat within the chamber, and also has no deflector within the chamber such as is shown and referred to in said patent by the "deflector R"; and also in its construction for the passage of the heat to the chamber. The model shows an opening for such passage which is practically an annular space conducting and distributing the heat to all sides of the chamber as it enters the same, whereas in the said patent the heat enters the chamber at and only on one side of the meat which is being cooked within it. The chamber of the model, Exhibit C, serves the same purpose as the chamber B of the Shaw patent, and the hooks of said model serve substantially the same purpose as the broiler D of the Shaw patent, and in both instances the pan which is below the meat being cooked catches and holds the drippings of fat, etc., from the meat, and in both this pan is so located and supported in position that the drippings held by it will not be burned by the heat from the gas flames, this burning in the model, Exhibit C, being doubly prevented, first by the non-conductor of heat with which the bottom piece of the model is filled, and second by the interposed air space between the pan and said bottom piece, whereas in the pat-

44 ent it is prevented simply by the open chambered construction of the bottom to the chamber B, on which the dripping pan C rests. In the model, Exhibit C, the heat, in passing into the chamber, passes at once and simultaneously into contact with all parts of the meat being cooked, whereas in said Shaw's patent the heat is conducted to one side of the meat and afterwards, by action of the deflector R, made to the more thoroughly diffuse itself through the chamber, and thus to act upon the other side of the meat. The same likenesses and differences which I have given in relation to model Exhibit C and said Shaw patent are found in substance to be in defendant's Exhibit B. The Teller patent resembles model Exhibit C in its enclosed chamber, and also somewhat in its upper deflector C. There are means for suspending the meat in a vertical position, and these means are pins, whereas in the model, Exhibit C, they are hooks. There is no dripping pan shown or described in the Teller contrivance, nor any construction of the bottom to prevent the conduction of heat through it. It has such openings to the heating apparatus that the heat in entering the casing is directed at once equally to all sides of the meat which is being cooked. Model Exhibit C resembles the contrivances of the Lazear patent as follows: first, in its chamber in which the meat is to be cooked; second, in its dripping pan; third, in the construction of its bottom piece or "trough E"; and fourth in its opening about said trough for the passage of the heat to the meat cooking; and further, except as to its form of construction, it resembles the broiler D of the said patent. It differs from said patent in no substantial respect. All the elements and parts of the contrivances of said patent which are essential for the cooking of meat, as designed in both cases, are found in model Exhibit C, and also found there arranged in substantially a similar manner and under and for a substantially similar operation when the apparatuses are used for cooking purposes as designed. All that the contrivances of the Lazear patent accomplish under the arrangement and construction of parts therein described, the model, Exhibit C, will accomplish, and I can find no substantial difference between the two contrivances, but there are, as it is true, differences in details, but I do not regard such differences as in the least degree substantial in the operation of the two apparatuses.

(Same objection to the answer.)

Int. 5. Please compare the model, Exhibit C, with the model
45 Complainant's Exhibit No. 4, and state the resemblances and differences of their several parts and functions, each with the other.

(Same objection.)

A. Model, Exhibit 4, resembles the model, Exhibit C, in all substantial respects as to the holding of the meat in a vertical position, the catching of the drippings from the meat as it is being cooked, and the prevention of the burning of such drippings, and differs only therefrom in some matters of detail construction, such as for instance the shape and arrangement of the trough or pan for catching the drippings, and the construction of devices for holding the meat in position; neither of which do I regard as essential or substantial in the operation and function of the several devices which go to make up the whole contrivance. The model, Exhibit 4, as I understand it, is made for use over the pot hole of an ordinary cooking apparatus in which coal is to be used. (Objected to as hearsay.) Whereas, model, Exhibit C, as I learn from the deposition of Mr. Shaw, was designed and intended for use in connection with gas or a gas stove.

Int. 6. Please compare complainant's Exhibit 4 with the defendant's

Exhibit N, and state the similarities and dissimilarities of their several parts and functions each with the other.

A. These two models resemble each other and only differ in some matters of detail construction, such as, for instance, the shape and arrangement of the trough or pan for catching the drippings; and again, they differ as to the kind of heating apparatus in connection with which they are to be used. As I have stated in my answer to the last interrogatory in relation to Exhibits 4 and C, that is to say, Exhibit 4, as I understand it, is for use in connection with an ordinary cooking apparatus, employing coal, and Exhibit N, for a heating apparatus, employing gas.

Int. 7. Please state, with regard to the contrivances of the Shaw, Teller, and Lazear patents, whether there is any distinction in the source of heat and in the presence of products of combustion in the cooking chamber.

(Objected to as immaterial.)

A. There is a difference between the Teller patent and the Shaw and Lazear patents as to the matters inquired about, but no difference in that regard between the Shaw and Lazear patents. The difference which I refer to is this, that the contrivance of the Teller patent is designed to fit the hole in a cooking stove or range, whereas the contrivances of the other patents are designed for gas or a gas-stove.

46

Int. 8. Whether the efficiency of the said Shaw, Teller, and Lazear patented contrivances would be affected by their use in connection with other sources of heat than the one alluded to in the respective patents as the source intended for use?

(Same objection.)

A. I can see of no reason why they should, except in matter of degree.

Int. 9. Please compare complainant's Exhibit 4 with defendant's Exhibit B, and state the similarities and dissimilarities of their several parts and functions each with the other.

A. These two exhibits resemble each other in all respects, except as follows: That the dripping-pans are constructed and arranged in a somewhat different manner, but differ in no substantial respect as to their functions and operation in relation to the other parts of the contrivances, and also, that the broiler in Exhibit B is arranged at one side of the cooking-chamber, and the heat enters the cooking-chamber at one side of the broiler, whereas in Exhibit B the broiler is arranged in the center of the cooking-chamber, and the heat enters the cooking-chamber at both sides of the broiler. The latter arrangement of the broiler and of the passages for the heat at the two sides of the broiler, I regard as in a degree more efficient in the use of the contrivance, but I do not regard it as essential, for I think that in either case a practical cooking operation can be carried on. There are some matters of detail construction which are different in the two exhibits, but I do not regard these as essential or substantial in their operation as a whole, therefore I do not think it necessary to here refer to it.

Cross-examination by A. V. BRIESEN, Esq., counsel for complainant, which he states is de bene esse as far as it may relate to the subject-matter objected in the direct examination:

X Int. 10. Do you regard the air passage, which is directly beneath the dripping-pan in Exhibit No. 4, to be substantially equivalent of the plaster of Paris filling which is directly beneath the dripping-pan in Exhibit N?

A. I do.

47 X Int. 11. What is the function of such air or plaster filling?

A. The function is to prevent the transmission of heat to such a degree to the drippings which may be in the pan that such drippings will be burnt.

X Int. 12. Would the contents of the dripping pan be protected in like manner, if the products of combustion were admitted between the pan and the plaster of Paris filling in Exhibit N?

A. As the pan is there arranged, there is no chance for the products of combustion to pass between the dripping-pan and the plaster of Paris. If air was allowed to circulate under the dripping-pan, it would be more or less prevented by such circulation of air.

(Answer objected to as not responsive.)

X Int. 13. X-question 12 repeated.

A. I can't answer the question till you show me how the pan is arranged, for certainly the model, Exhibit N, does not show any arrangement whereby the products of combustion can pass between the pan and the plaster filling.

(Same objection.)

X Int. 14. Is that as good an answer as you can give?

A. Unless some statement is made to me of how that pan is arranged, so that the products of combustion can pass between it and the plaster of Paris, I do not think that I should answer the question otherwise than I have, for the reason that I am not called upon by the question to suppose an arrangement of the pan which would permit it.

X Int. 15. Where do the products of combustion escape from Exhibit N?

A. I see no way for their escape except at the bottom and through the cracks about the door.

X Int. 16. That being the case, do not the products of combustion fill the entire vacant space enclosed by the shell of Exhibit N?

A. I should think they did.

X Int. 17. Now, suppose the dripping-pan in Exhibit N to be by, say two metal ribs, raised an inch or two off the plaster, would not the products of combustion enter beneath the dripping-pan?

A. I think they would.

48 X Int. 18. Will you now please answer X q. 12?

A. They would be protected both by the plaster filling and by the fact that as the V-shaped trough is formed, the pan would not be subjected to the direct impingement of the flames from the products of combustion.

X Int. 19. To this you will swear as a fact, will you?

A. I don't know as I can swear to it as a fact, for I never tried it; but I can swear to it as a matter of opinion, and as a fact that nothing will be heated in any practical sense in a given length of time, to such a degree by radiation from reflection of heat, as it would be by a direct impingement upon it of the flames which produce the heat.

X Int. 20. Would the plaster of Paris, in the case given, protect the pan against the action of the products of combustion which enter between the pan and the plaster of Paris?

A. It would not.

X Int. 21. Where do the products of combustion escape from the thing shown in Exhibit M?

A. This exhibit is a good cut of an apparatus, which I understand has been referred to in the deposition of Wm. F. Shaw, and is somewhat vague as to the internal construction of the apparatus which is

shown. There appears, however, to be at the upper portion the representation in vertical section of a conical-shaped casing, like the conical shaped top piece or casing in Exhibit C, and also of a cylindrical casing, which is within the conical-shaped casing that I have referred to, and this latter casing I find to correspond with the upper inner cylindrical casing shown in Exhibit C, at the upper end of which is a hole, closed by a removable cover or lid. Between these two casings there is a chamber or space, and this space appears to be in communication by appertures with the interior of the cylindrical casing, and by an annular space with the surrounding atmosphere; and, as to this, if I am right in my interpretation of Exhibit M, it corresponds exactly with the communications shown in Exhibit C, at this part. As it is shown in Exhibit M, the opening, which is closed by a lid or cover in Exhibit C, is filled by a tea-pot. With this explanation of Exhibit M, as I understand it, the products of combustion would escape at the annular opening which is at the bottom of the conical-shaped casing.

X Int. 22. What direction do products of combustion take in a chamber which has an inlet opening at the bottom and an outlet opening at the top or upper part?

49 A. An upward direction.

X Int. 23. From one opening to the other, or how?

A. They will go from one opening to the other, but their travel would be more or less direct, according to the relative position of the two openings.

X Int. 24. If there were no obstruction between the two openings, would not the draft cause the products of combustion to travel directly from the lower to the upper opening?

A. Not necessarily under all conditions.

X Int. 25. Why not?

A. If the communication between the two openings was a straight passage of a size equal to the opening at which the products of combustion entered it, the products of combustion would travel directly to the outlet opening, but if there was a passage between the two openings which was in any degree larger than the inlet opening for the products of combustion, their direct travel to the outlet opening would be more or less effected by this enlargement of the channel of communication between the two openings.

X Int. 26. Will, in your opinion, as much heat be admitted to one side of the broiler in Exhibit B as to the other?

A. I think the side of the broiler which is the farther removed from the side opening at the lower portion of this broiling apparatus would not be heated to the same degree as the opposite side thereto, but I do not think there would be any great or practical amount of difference between the heat of the two sides in relation to the purpose for which the apparatus is designed.

(Latter part of answer objected to as not responsive.)

X Int. 27. Why is the removable cover or face of Exhibit B made hollow?

A. I suppose to prevent radiation of heat from the cooking chamber.

X Int. 28. Does that hollow chamber in the cover of Exhibit B keep the same cool?

A. I don't think it keeps it absolutely cool, but I think it tends to keep it cooler than it would be without it.

X Int. 29. Does the broiler bear directly against this hollow cover in Exhibit B?

A. It could be made to bear directly against it, but I don't think it was intended that it should bear against it.

X Int. 30. How many inlet openings are there in Exhibit No. 4, for the products of combustion?

50 A. One where it directly rests upon the stove, and two before the products of combustion enter the cooking chamber proper.

X Int. 31. How many inlet openings are there in Exhibit N?

A. Same as in Exhibit 4.

X Int. 32. How many in Exhibit B?

A. One.

X Int. 33. What separates the inlet openings in Exhibit No. 4?

A. A V-shaped cross-piece.

X Int. 34. Is it not a V-shaped trough?

A. It is not a trough, for a trough implies a vessel to hold something.

X. Int. 35. Have you not stated that it does hold a non-conductor of heat, which separates the same from the dripping-pan?

A. I have stated that the dripping-pan was separated from the products of combustion as they pass into the cooking chamber, by an air chamber or space, which is open at each end, to the outside of the cooking chamber.

X Int. 36. And what constitutes the lower wall of that air chamber?

A. The cross-piece which I have referred to in my answer No. 33.

X Int. 37. You have testified about an air chamber beneath the dripping-pan of Exhibit B; is that air chamber interposed between the products of combustion and the dripping-pan?

A. No, it is at one side.

X Int. 38. What separates the two inlet openings of Exhibit N?

A. A V-shaped cross piece, which is termed in the patent as a V-shaped trough, containing the plaster of Paris filling, E^1.

X Int. 39. Is, in your opinion, a trough not a trough unless it is filled with something?

A. No, sir.

X Int. 40. What is a trough?

A. A trough, in my opinion, is a vessel which is longer than it is wide, and is capable of holding liquids, more particularly, without escaping from it.

X Int. 41. And if it allows them to escape it is not a trough, is that it?

A. It can be a trough and yet be adapted to allow the liquids to escape.

ADBERT W. BROWN.

Attest:

W. H. H. ANDREWS, *Special Examiner.*

51 It is admitted that complainant's Exhibit 4 was manufactur and adapted to be used upon the top of a stove or range, over the pot-hole or opening directly over the fire, and not intended to be used over a jet or jets of burning gas.

But counsel for complainant does not admit that it is not adapted for use on gas stoves, or that it makes any difference whether it be used over a coal or gas fire.

Defendants rest.

Counsel for complainant gives notice that he will take the deposition de bene esse, of Mr. F. du Faur, J. N. McIntire, and others, who reside at a greater distance than 100 miles from the place of trial of this suit,

at his office, No. 258 Broadway, New York, on the 26th day of April, 1877, at 11 a. m., before E. C. Webb, notary public. Due service of this notice is admitted.

Counsel for complainant also requests that Exhibits B, C, N, and No. 4, be sent to his office at New York, at the earliest possible date, and at his expense.

Taken and subscribed before me.

W. H. H. ANDREWS,
Special Examiner.

I, W. H. H. Andrews, special examiner, appointed by the United States circuit court, do hereby certify that on the 6th and 7th days of April, A. D. 1877, I was attended by the aforesaid witnessess, who were of sound mind and lawful age, and having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, did, on said days, answer the interrogatories and cross-interrogatories put to them, and the testimony given by them was reduced to writing by me, and afterwards read to them by me, and subscribed by them in my presence.

I further certify that John L. S. Roberts, esq., counsel for defendant, and A. v. Briesen, esq., counsel for complainant, were present at the taking of said depositions.

I further certify that I am not as counsel or attorney to either of the parties in the cause for which said depositions are taken, nor in any way interested in the event of said cause.

In witness whereof I have hereunto set my hand this 9th day of April, A. D. 1877.

W. H. H. ANDREWS,
Special Examiner.

52 REBUTTING EVIDENCE FOR COMPLAINANT.

JAMES L. SHARP
vs.
THE DOVER STAMPING CO.

Depositions, de bene esse, taken at New York, N. Y., pursuant to notice given on the 6th day of April, 1877, before Ernest C. Webb, notary public.

NEW YORK, *April 26th*, 1877—11 *a. m.*

Present, A. v. Briesen, of counsel for complainant; John L. S. Roberts, of counsel for defendant.

A. FABER DU FAUR, a witness called on behalf of complainant, being duly sworn, deposes and says as follows:

Q. 1. What is your name, age, residence, and occupation?

A. A. Faber du Faur; I am 51 years old; reside at Newark, New Jersey, and am an engineer and metallurgist, and expert in patent causes.

Q. 2. Since when have you acted as an expert in patent cases, and where?

A. For the last nine years I have frequently been called upon to give testimony as expert witness in patent causes, in the southern and northern districts of New York, New Jersey, Massachusetts, and other places.

Q. 3. Have you read, and do you understand letters patent No. 79,989, marked Complainant's Exhibit No. 1?

A. I have read it, and I believe I understand the same.

Q. 4. Have you read, and do you understand letters patent No. 28,271, and do you understand the invention therein described?

A. I have read it, and I believe I understand the invention therein described.

Q. 5. Please compare the inventions described in said two patents with one another, and point out in what respect, if any, the invention described in the first and third claims of Exhibit No. 1, is described or shown in Exhibit A?

A. Both Exhibit No. 1 and Exhibit A show and describe broilers where the broiling wires are placed in a vertical position,
53 but in Exhibit A the steak is only exposed on one side to the direct action of the gas, while in Exhibit No. 1 it is evenly exposed on both sides. In Exhibit A the gas burner or other source of heat is at some distance on one side of the steak, and of the dripping-pan, while in Exhibit No. 1 the source of heat is below the steak and below the dripping-pan, separated from the latter by a space filled with non conducting material, the lower sides of which space are V-shaped, throwing the flame evenly on both sides of the steak.

I do not find in Exhibit A a V-shaped trough as referred to in the first claim of Exhibit 1, nor do I find a division of the flame such as shown and described in Exhibit No. 1, and referred to in the first claim of Exhibit 1, as follows: "The V-shaped trough E, and the filling E, by which the flame is divided."

There is an air space beneath the dripping pan in Exhibit A, but this is not an air space between the dripping pan and the flame, and the flame does not strike against the lower side of this air space.

For the above reasons I do not find in Exhibit A the combination of elements recited in the first claim of Exhibit 1, nor do I find the result produced by that combination of elements.

I do not find in Exhibit A an apparatus for broiling steak by gas, where both sides of the steak are equally exposed to the flame and heat, such as referred to in the third claim of Exhibit 1.

Q. 6. How do you know that Exhibit A is not an apparatus for broiling steak by gas, where both sides of the steak are equally exposed to flame and heat?

A. The drawing of Exhibit A shows it; and an experiment with the apparatus has further convinced me in this opinion, which opinion I had before making the experiment.

Q. 7. What experiment? Please describe it in full.

(Objected to as immaterial.)

A. An experiment was made on April 25th, 1877, with Exhibit B, with two burners; the steak was placed in the broiler in the manner shown and described in Exhibit A; after remaining there for seven minutes the grease began to flash up; after the steak had remained in the broiler for eight minutes it was taken out for examination. The side towards the burners was done and partly burned at the top. The inside was not so well done and raw at the bottom. The steak was again returned to the broiler so as to expose the other side to the flame. After four minutes there were explosive flashes again. After six and a
54 half minutes the steak was again taken out. The top was overdone, and cutting showed a great difference between the top and bottom. The bottom was not as well cooked as the top. The total time that the steak was in the broiler was fourteen and a half minutes. The experiment conclusively showed to me that in this apparatus the steak had not been on both sides equally exposed to the heat.

Q. 8. Will you produce the burners which were used on Exhibit B, as stated by you?

A. I herewith produce them.

Offered in evidence, and marked Complainant's Exhibit 5, April 26, 1877, E. C. W., notary.

Q. 9. How do you account for the burning of the steak at the top in Exhibit B?

(Same objection.)

A. The inclined deflecting plate E, shown in Exhibit A, throws the flame away from the bottom, and it is afterwards deflected against the top, so that the top is more exposed to the direct action of the flame than the bottom.

Q. 10. You say that the steak was placed in the broiler Exhibit B in the manner shown and described in Exhibit A; how was that?

A. The steak was placed in a vertical position, as shown in the drawing, figure 2 of Exhibit A, and as described in the specification of Exhibit A, as follows: "Against or alongside of the inner face of said cover and within the heating chamber a steak holder, D, is placed." The cover referred to in this quotation, is the cover B^1, as follows, from the part of the specification preceding the last quotation, viz: "A heating or broiling chamber or vessel B, whose front vertical side or cover is constructed as a thin hollow box or chamber B^1."

Q. 11. Being thus placed within the broiler, please state by reference to the Shaw patent, Exhibit A, what proportion of heat or heated gases there is on one side and what proportion on the other side of the steak.

A. According to the drawing the spaces are about as one to twelve.

Q. 12. And how do you find these proportions in Exhibit B?

A. About as one to sixteen.

Q. 13. What is, in your opinion, the practical effect of exposing
55 the steak at one side to a heating chamber from twelve to sixteen times smaller than that on the other side, and where, as in Exhibits A and B, the smaller part is furthest from the source of heat?

A. The action will not be equal on both sides. The side towards the larger space where the flame enters will be done quicker than the other side. Any vapors rising from the side not exposed to the flame will have to pass out through the narrow space, thus still further preventing circulation of the hot gas. The experiment of which I have already spoken shows that practically there is a difference in the effect on the two sides of the steak.

Q. 14. State whether or not this difference is necessarily material, and give your reasons.

A. It is a material difference in this respect, that one side of the steak will be cooked quicker than the other, and unless the steak be turned it cannot be evenly cooked on both sides; that is, irrespective of the difference between top and bottom.

Q. 15. Please look at Exhibit C, and state whether or not you find it in the invention described in the first and third claims of the patent Exhibit No. 1.

A. I have examined Exhibit C, and I do not find therein the invention described in the first and third claims of Exhibit No. 1. Exhibit C does not have the V-shaped trough referred to in the first claim of Exhibit No. 1. It has a cone with a non-conducting filling, but such a cone is substantially different from a trough, and does not direct the flame over the whole width of the steak uniformly as the trough does, but spreads it out in the shape of a hollow cone, so that different parts of

the flame are at different distances from the face of the steak. For this reason I do not find in Exhibit C the invention described in the first claim of Exhibit 1, and also because Exhibit C is not a practical broiler. The apparatus Exhibit C is substantially different from the apparatus shown and described in Exhibit No. 1, and referred to in the third claim thereof, because it does not have the V shaped trough spreading the flame uniformly on the two sides of the steak. It also does not show the narrow dripping-pan on edge of which the flame passes up close to the faces of the steak, and because practically it is not a broiler.

Q. 16. How does the relative position of the dripping-pan and cone in Exhibit C compare with the relative position of dripping-pan and trough in Exhibit No. 1?

A. As the apparatus is arranged the dripping-pan rests on a
56 couple of wires about two and a half inches above the top of the cone, which is the flat, circular surface, thus allowing the gases to circulate beneath the bottom of the pan. In Exhibit No. 1 the pan rests on the top of the V-shaped trough, and the flame cannot circulate between the V-shaped trough and the pan. I consider this to be a material difference between the two exhibits, because in Exhibit C the bottom of the pan is not protected from the flame as in Exhibit 1, and will not prevent the heat of the flame from burning the grease and the dripping-pan, if there should be heat enough to broil a steak.

Q. 17. Mr. Brown, the expert witness for the defendant, has testified, under oath, that the space between what has been termed the dripping-pan and the cone in Exhibit C is an air space; will you please state whether you find it to be an air space when the apparatus is in operation?

A. I do not. By an air space in an apparatus heated by a flame, I understand a space which is enclosed so as to entirely exclude the flame and gases from the air space. Such air spaces are frequently used in the arts, for instance in puddling furnaces, but the flame never circulates in such air spaces. In fact, as soon as the surroundings are burned out so as to open the communication between the air space and the flame, the sufficiency of the apparatus is destroyed. An air space from which the flame is practically excluded is also in Exhibit No. 4. I do not believe that Mr. Brown would be able to tell where the air space begins and where it ends in Exhibit C.

Q. 18. What is the practical effect of raising the pan in Exhibit C from the cone, so far as you know?

A. The interior part of the bottom of the pan is more exposed to heat than if the pan were on the cone, in which case the corners only would be exposed to the direct impinging of the flame. With the pan placed on the wires as in Exhibit C, the steak must be at a greater distance from the source of heat, and in the experiment made with this apparatus yesterday it was found impossible to properly cook the steak, although it had been in the apparatus for half an hour. In making this experiment the same burner was used as with Exhibit N, and the same gas pipe as with all the exhibits, and the same opening of the stop cock. The burner was a single burner, which I now produce.

Q. 19. What is the effect of raising the pan on the drippings that fall into the pan in Exhibit C?

A. The gases are allowed to pass under the pan, and heating the pan so that the drippings are not protected from burning.

57 Q. 20. Were you present at the experiments about which Mrs Mason has testified this morning?

A. I was.

Q. 21. What was the proportion of drippings in the pan of Exhibit C at the time of that experiment?

A. The quantity was hardly appreciable.

Q. 22. And what with respect with the other three exhibits?

A. In all of them there was a regular quantity of drippings, about as much as would fill the cup in Exhibit 4.

The burner produced by the witness in answer to question 18 is offered in evidence, and marked Complainant's Exhibit 6, April 26, 1877, E. C. W., notary.

Q. 23. It is said that Exhibit No. 4 is adapted and intended to be used upon the top of the stove or range over the pot hole or opening directly over the fire. Please state whether or not you find it to be equally well adapted for use over the pot hole of a gas stove. And state also whether or not Exhibit N is adapted for use over the pot hole of a stove or range.

A. Exhibit 4 is adapted to be used over the pot hole of a gas stove, as has been demonstrated by the experiment. I see no reason why Exhibit N should not also be adapted to be used upon the top of a stove or range in the same manner as Exhibit 4.

Q. 24. What is the difference, if any, in the composition of the products of combustion produced from ordinary illuminating gas, and those produced by a coal fire in a stove or range?

A. Ordinary illuminating gas being a hydro carbon, will, by its combustion, form carbonic acid and vapor of water if the combustion be complete, otherwise the flame may contain free hydrogen and free carbon, also carbonic oxide. Of course the nitrogen from the air will always be contained in the gas.

The flame from coal fire in a stove or range when in such a condition as to be used for broiling will be almost free from hydrogen and vapors of water, and consists principally of carbonic acid nitrogen, and may also contain carbonic oxide. If bituminous coal should be used there would be more hydrogen in the flame or more vapors of water.

Q. 25. What is there in Exhibit No. 4 between the dripping-pan and the fire?

A. There is a V-shaped trough, which contains air as a non-conducting material. It is an air cooler, just the same as in other devices
58 used in the arts, where certain parts have to be kept cool, which is done by passing through such parts a metallic trough or pipe open at the ends so as to give access to the air. Such devices are, for instance, used in puddling furnaces.

Q. 26. How does the V-shaped trough shown in Exhibit 4 compare with that shown in Exhibit No. 1?

A. I consider the V-shaped trough in Exhibit 4 substantially the same as the V-shaped trough in Exhibit No. 1; the only difference being in the material used for preventing the transmission of heat. But in Exhibit No. 1 the inventor does not restrict himself to any particular non-conductor of heat. I quote from the specification as follows: "The dripping pan F rest on plaster of Paris, or other good non-conductor of heat."

Air has long been known in the arts as such a non-conductor, and in Exhibit No. 4 the dripping-pan is on the top of an air space, the bottom of which is formed by the V-shaped trough.

Q. 27. I find the trough in Exhibits 1 and 4 to perform four functions. 1st, divides the inlet opening into two equal but separate apertures. 2d, it cuts the flame into two equal sheets with flat faces parallel to the gridiron. 3d, it supports the non-conducting material which protects

the dripping-pan; and 4th, it constitutes the actual support of the dripping-pan. What, if anything, performing these functions, do you find in Exhibit B?

A. I do not find in Exhibit B the inlet-opening divided into two separated apertures. I also do not find the flame cut into two equal sheets. I do find something to support the non-conducting material beneath the dripping-pan, but this part is not over the flame, and does not act as a protection from the flame, although it constitutes the support of the dripping-pan by means of two projecting ribs.

Cross-examined:

X Q. 28. What difference is there, if any, between dividing a flame with an arrangement like that shown in Exhibit N and that shown in Exhibit C?

(Objected to as assuming that the flame in Exhibit C is divided, which is not the case.)

A. I have already stated that in Exhibit C the flame is spread out into a hollow cone, and not divided into two separate and distinct sheets, rising under two sides of the steak, and I have also stated that if the flame is spread out into a hollow cone, its distance from a flat steak suspended or otherwise secured in a vertical position
59 through the axis of the cone differs for the different parts of the steak, being nothing or very small at the ends of the steak, and equal to, or nearly equal to, the radius of the flat surface at the middle part. The diameter of the flat surface of the cone in Exhibit C is about ten inches, making the distance of the flame from the middle of the steak nearly five inches. The evil effect of having the flame at such a distance is shown in Exhibit B, where the steak near the bottom is not so well done as near the top.

X Q. 29. Is there any difference in result, if so, what, in dividing a flame with an apparatus shaped like a wedge, or one shaped like a cone, and the flame impinging upon the sharp end of the wedge and upon the apex of the cone?

(Objected to as indefinite in not giving the relative length of the wedge to the opening into which it is placed, nor the relative diameter of the cone to such opening or the flame, and as describing an imperfect apparatus.)

A. This depends entirely on the object for which the apparatus is made. In an apparatus for broiling a sausage, a cone, if not made too large, like Exhibit C, may answer, or if like Exhibit C, if the sausage should be ten inches in diameter. For broiling a flat steak, I think there is considerable difference, as I have fully explained in my former answers.

X Q. 30. Will the cone in Exhibit C divide a flame of burning gas when presented to the apex thereof?

A. It will not; it will spread it out in the shape of a hollow cone.

X Q. 31. Into what shape will the wedge shaped trough in Exhibit N divide a gas flame when presented to the sharp edge thereof?

A. It will divide it into two separate and distinct sheets presented, an inner face of about the width of the steak, and at about equal distances from the steak, the outer surface being curved.

X Q. 32. In each case when the flame strikes the obstructing wedge or cone, does not it assume the shape of such obstruction—a wedge shape in one instance and a conical shape in the other?

(Objected to as immaterial.)

A. The inner surfaces do in the case of the wedge, and the inner surface does in the case of the cone.

60 X Q. 33. Does not the cone in Exhibit C also protect the grease in the pan from being burned?

A. With an ordinary supply of gas, such as has been used for Exhibits N, B, and 4, it does it most effectively, so much so, that it absorbs all the heat, and neither the pan nor the steak get hot enough to be broiled. If there were flame enough supplied to practically broil the steak, I do not think that the cone would be any protection, because the flame is free to circulate under the pan, and if there be heat enough to broil the steak the pan will be hot enough to burn the grease.

X Q. 34. In Exhibit C, what direction will the flame and heat take when used for cooking purposes?

A. It will start in the direction of the surface of the cone, and then gradually change to an upward direction towards the center and out through the circular hole on the top to the hole in the upper part of the inner cylinder of the cap piece, and from there downward between the inner cylinder and the outer cone of the cap, escaping finally between the lower end of the cone of the cap and the top part of the main shell.

X Q. 35. In Exhibit N, what direction does the flame and heat take?

A. The direction first is upward, and because, in Exhibit N, there is no outlet at the top, there must necessarily be a return current, which, I suppose, is on the outer part of the two sheets of flame, downward and out through the outside of the hole through which the flame enters.

X Q. 36. If such be the case, what greater protection does the V-shaped trough give to the dripping-pan from the heat than if it was raised above the same the space of one-half inch or less?

(Objected to as incompentent, as it does not appear that Exhibit N correctly represents the machine described in complainant's patent, Exhibit No. 1.)

A. If the dripping-pan were raised the flame would be free to circulate beneath the dripping-pan; any air or gases beneath the dripping-pan, if cool, would take a downward direction and be replaced by hot gases, thus heating the pan and giving it less or no protection from the heat.

X Q. 37. What is a dripping-pan, as you understand it?

A. A dripping-pan is a pan which receives the drippings.

X Q. 38. What is a trough, as you understand it?

A. A trough is a receptable which is longer than wide. On
61 blast furnaces there are sometimes iron runners used for the cinders to run through, which are called cinder-troughs; they are of about V-shaped section; they are longer than wide, and are called cinder-troughs.

X Q. 39. Which is the dripping pan in Exhibit 4?

A. The upper V-shaped tin, covering the air space, and receiving the drippings, which drippings from the dripping pan run into the dipper which hangs on the outside.

X Q. 40. Is Exhibit N, as now constituted, adapted for use over the pot hole of an ordinary range or cooking stove?

A. I think it is, because ranges are frequently, if not generally, supplied with rings for different diameters of openings.

X Q. 41. In your opinion, could Exhibit N be used with equally good results, as now shaped, over the pot hole of an ordinary range, as Exhibit 4?

(Objected to as immaterial.)

A. I think it could, only in most cases the pot hole would be too large, and it would be better to adapt the apparatus for larger pot holes where such are used.

X Q. 42. When the experiment was made with Exhibit B, how was the broiling wire placed relative to the cover; whether near to the same or how otherwise?

(Objected to as already answered in answer to question 10.)

A. It was placed in a vertical position against the cover, as stated in Exhibit A. The vertical wires, of course, could not entirely rest against the cover, because the apparatus does not admit of it. There is certainly not less than an eighth of an inch space between the vertical wires and the cover. The steak holder was just dropped in vertically, and was probably about a quarter of an inch out.

X Q. 43. Suppose the bottom of the steak holder had been placed at the inner side of the dripping pan, in your opinion, would there have been any different result?

(Objected to as going outside of the patent, Exhibit A, to which defendant's counsel must limit his defense.)

A. Not materially different, in my opinion.

62 X Q. 44. In Exhibit C, was not the steak equally exposed to the flame and heat; if not, why not?

(Objected to as already answered.)

A. I have already stated that at the different parts of the steak, the distance from the source of heat is different.

X Q. 45. Was not the heat equally diffused throughout the entire inclosure; if not, why not?

A. It is difficult to say whether it was or not, because there was hardly any heat. Most of the heat was taken up in heating the cone to a red heat at the apex, and by the great amount of non-conducting material with which that ten-inch cone is filled.

Redirect:

R. D. Q. 46. What do you mean by defining a trough as a receptacle?

A. By receptacle I do not mean that the liquid must necessarily remain in it; it may flow through it as I have explained by the example of a cinder trough of blast furnaces.

R. D. Q. 47. How do you define the word "divided," as used in the first claim of Exhibit No. 1?

(Objected to as being incompetent and not a subject-matter to which the witness, as an expert, is qualified to express an opinion.)

A. I understand by it separation into two separate and distinct parts or sheets.

A. FABER DU FAUR.

Subscribed and sworn to before me this 26th day of April, A. D. 1877.

ERNEST C. WEBB,
Notary Public (*No.* 145), *N. Y. Co.*

Mrs. LIZZIE W. MASON, a witness called on behalf of complainant' being duly sworn, deposes and says as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Mrs. Lizzie W. Mason; I am 38 years old; reside at 101 West 13th street, New York; I am engaged in the drug business at present.

63 Q. 3. Please state whether you have kept house, and are practically acquainted with the art of cooking.

A. I have been keeping house 14 years constantly, and have attended to my cooking pretty much all the time; in fact, I might say I have taught every servant girl I ever had how to cook.

Q. 2. Please look at the instruments marked Exhibits B, C, N, and

No. 4, and state whether or not you have seen them before, and whether or not you have broiled steaks therein, and, if so, when?

(Last part of question, after the word "before," objected to as immaterial.)

A. I saw steaks broiled in all of them yesterday. Mr. Sharp's, like Exhibit N, I have used personally.

Q. 4. Please state the result of the broiling yesterday, as fully as possible, with reference to each of the four exhibits.

(Same objection.)

A. Exhibit B was the first one we tried. I took notes yesterday of the time it took to broil the steaks. The steak remained in Exhibit B eight minutes. In three minutes after it was put in it flamed and the grease flowed over and it smoked; when we took it out it was burned at the top and quite raw at the bottom. It was put back and remained six minutes and a half longer, and when taken out one side was burned and the other moderately well done. It was in fourteen minutes and a half altogether.

The next we tried was Exhibit N. The steak was put in and remianed eight minutes, and when taken out it was what I consider a steak well enough done for any one. It was rare, but not raw. It was done as much as I ever cook a steak. It was evenly cooked on both sides. There was no smell or smoke. It was then put back and remained six minutes and a half, and when taken out it was well cooked through and done evenly. There was no rare appearance to it.

The next we tried was No. 4 That was put in and remained eight minutes and a half. It smoked in three minutes, and the blaze came out all around the edge and underneath the stove. When that was taken out it was blackened at the edges, but cooked more evenly than the first one. That one we did not put back a second time. The next we tried was Exhibit C. That was in eight minutes, and when
64 inspected was hardly warm; remained in fourteen minutes, and when inspected again had no appearance of cooking; looked perfectly raw, and remained in thirty minutes, and when taken out was not done.

Q. 5. You have stated that when the steak had been in Exhibit B eight minutes it was burnt on top and raw at the bottom. Please state whether it was so burned on both sides, and, if not, describe the appearance of the other side.

(Same objection.)

A. The side next to the front of the burner was not burnt, but had a dried appearance. I should think, to cook a steak in that broiler, you would have to turn it in order to cook it at all without burning one side entirely and not cooking the other.

Q. 6. You say the side next to the front of Exhibit B had a dried appearance. Please state whether or not it was "done" after the eight minutes.

(Same objection.)

A. It was not done.

Q. 7. Please state whether or not, after the steak had been eight minutes in Exhibit B, it was turned to expose the side which was not done, as you say, to the action of the fire.

A. I did not observe that.

Q. 8. How were the four steaks about which you have testified like or unlike one another?

(Same objection.)

A. They were all very even before they were cooked. I don't think

you could have seen any difference in them as far as thickness and size was concerned.

Q. 9. On what kind of flame were these experiments made; gas or what?

(Same objection.)

A. On gas.

Q. 10. How many burners were there used on Exhibit B?

(Same objection.)

A. Two burners.

Q. 11. How many on each of the others?

(Same objection.)

A. One.

65 Cross-examined:

X Q. 12. How long have you been married and what part of said time have you been engaged in cooking meats?

A. I have been married seventeen years last October, and I think I could safely say I have cooked steaks since I was ten years old. That's when I learned to do it.

X Q. 13. How long time past have you been engaged in the drug business, and where, and how much of your time has been devoted to the same?

A. I have had an interest in a drug store for six years, but I did not devote any of my time to it. I have kept house in a flat over the store at No. 101 West 13th street, New York City, N. Y.

X Q. 14. What relation, if any, do you bear to Mr. James L. Sharp, the complainant in this suit, and how long have you known him?

(Objected to as not cross-examination and as incompetent.)

A. I am no relation to him whatever, and I have known him about 6 or seven years; I have known him in a business way by going in his store.

X Q. 15. When did you first see a broiler like Exhibit N and when first did you use one?

A. I think about two years ago, as near as I can remember.

X Q. 16. State as near as you can about how many times you have used the same for cooking steak by gas.

A. I might be safe in saying I have used it quite a number of times; at least twenty-five times; may have been fifty. The boiler was not owned by me, but belonged to the lady living on the floor above, and I borrowed it from her. It always broiled successfully, and I never had any trouble with it.

(All that part of answer after the words "from her" objected to as irresponsive.)

X Q. 17. Do you know the amount of gas that was consumed in the stove when making the experiments with Exhibits C, N, and 4?

(Same objection as to question 14.)

A. How in the world would you suppose I could know that? You would have to have a gas meter to tell that. Of course I do not know.

66 X Q. 18. What size burner or tip was used, if you know, with these last three named exhibits?

A. That I do not know.

X Q. 19. What sized burners or tips were used with Exhibit B?

A. I do not know.

X Q. 20. What kind of steaks were used?

A. Medium sized porter-house steaks.

X Q. 21. Have you ever used, or seen used, any other gas broiler than those already mentioned by you?

(Same objection as to question 14.)

A. I have used and had one of Mr. Bogart's gas-stoves. I have had it about ten years; I think it is called the Metropolitan; I still have it; the steak in that is not cooked vertically but horizontally.

MRS. L. W. MASON.

Subscribed and sworn to before me this 26th day of April, A. D. 1877.

ERNEST C. WEBB,
Notary Public (*No.* 145), *N. Y. Co.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Ernest C. Webb, a notary public, duly commissioned and sworn under the laws of the State of New York, do hereby certify that the foregoing depositions of A. Faber du Faur and Mrs. Lizzie W. Mason were taken, subscribed, and sworn to before me this 26th day of April, 1877, pursuant to notice given on the 6th day of April, 1877, de bene esse, and that counsel were present for the respective parties. I also certify that the reason for taking the foregoing depositions is that both the said witnesses live more than 100 miles distant from Boston, Massachusetts, the place of trial.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said suit named, nor in any way interested in the event of said cause.

In testimony whereof I have hereunto set my hand and affixed my official seal this 26th day of April, 1877.

[NOTARIAL SEAL.]

ERNEST C. WEBB,
Notary Public (*No.* 145), *N. Y. Co.*

67 United States circuit court, district of Massachusetts. In equity.

JAMES L. SHARP
vs.
THE DOVER STAMPING CO.

Complainant's Exhibit No. 1.—*Sept.* 19, 1876.—*E. C. W., Notary.*

UNITED STATES PATENT OFFICE.

H. Y. Lazear, of New York, N. Y. Letters patent No. 79989, dated July 14, 1868. Improvement in gas heaters.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that I, H. Y. Lazear, of the city, county, and State of New York, have invented a new and improved apparatus for broiling steak by gas; and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable those skilled in the art to make and use the same, reference being had to the accompanying drawings forming part of this specification.

This invention relates to a new and improved apparatus for broiling meats or steaks by gas or over a gas stove; and it consists in arrang-

ing a closed casing or double-walled upright cylinder over a gas-stove in such a manner that the wire steak-broiler with the steak is inserted therein and the steak broiled simultaneously on both sides; and also in the arrangement for protecting the grease or juices which exude from steak from burning, and in the general formation and operation of the apparatus, as will be hereinafter described.

Figure 1 represents the casing or cylinder as when in use, standing upon a gas-stove, the latter being seen in red color.

Figure 2 is a vertical section of the same through the line *x x*. Similar letters of reference indicate corresponding parts.

A is the cylinder, which is made of tin or other suitable metal, composed of two oval casings, which, when placed together, leave an annular space between them, as seen in the drawing.

B represents the annular space.

C is the first chamber or interior of the cylinder in which the broiling is done.

D is the wire steak-broiler in which the steak is supported.

E is a V-shaped trough against which the flame impinges and is spread or divided and rises on each side, as seen in the drawing.

F represents the dripping-pan, in which the bottom of the broiler rests, and which receives the fat or juices from the meat.

The dripping-pan F rests on plaster of Paris or other good non-conductor of heat, E', with which the V-shaped trough E is filled or nearly filled, as seen, for the purpose of preventing the heat of the flame from burning the grease in the dripping-pan and thereby preventing smoke in the operation of broiling.

G is the cover which is taken off for inserting the steak and is then put on, and the broiling-chamber closed at the top while the steak is being broiled.

h represents orifices through the sides of the inner casing which allow of the discharge of the heated air or gases from the broiling chamber C into the annular space B, which gases descend, and are discharged into the atmosphere through the orifices *i* near the bottom of the outer casing.

J is a door in the end of the casing for admitting the dripping-pan.

By this arrangement the steak is broiled or cooked upon each side simultaneously.

The fat and juices are caught in the pan F and protected from burning by the filling E'.

The apparatus is very simple and durable and the operation is perfect.

I claim as new and desire to secure by letters patent—

1. The V-shaped trough E and the filling E', by which the flame is divided and the grease protected from burning and smoke thereby prevented, substantially as described in combination with a gas steak-boiler.

2. The annular space B and the orifices *h* and *i*, substantially as and for the purposes set forth.

3. An apparatus for broiling steak by gas, whereby the steak is broiled or cooked simultaneously on both sides, or where the sides are equally exposed to the flame and heat, substantially as shown and described.

The above specification of my invention signed by me this 10th day of June, 1868.

H. Y. LAZEAR.

Witnesses:
FRANK BLOCKLEY.
ALEX. F. ROBERTS.

Circuit court of the United States, district of Massachusetts. In equity.

JAMES L. SHARP
vs.
THE DOVER STAMPING CO.

Complainant's Exhibit No. 2.—September 19th 1876.—E. C. W., Notary.

Know all men by these presents that I, Hiram Y. Lazear, of the city, county, and State of New York, for and in consideration of the sum of eight thousand dollars, to me in hand paid (the receipt of which is hereby acknowledged), have sold, assigned, transferred, and set over, and by these presents do sell, assign, transfer, and set over unto William Phillips, of the city of New Bedford, county of Bristol, and State of Massachusetts, and to executors, administrators, and assigns forever, all my right, title, and interest in the following described letters patent, to wit:

One granted to Hiram Y. Lazear, for improvement in gas-burners, dated May 7th, 1867, and numbered 64544, and known as the "Dome" burner. Also one granted to Hiram Y. Lazear for improvement in gas broiling apparatus, dated July 14th, 1868, and numbered 79989,
71 and known as the "Dome" broiler. Also one granted to Hiram Y. Lazear and James L. Sharp for improvement in gas-burners, dated July 6th 1869, and numbered 92322, and known as the H. L. burner. Also one granted to Thomas J. Kelly, dated Nov. 14th, 1865, and numbered 50938, and known as the "Etna" burner, and two-thirds of which was assigned by said Kelly to Thomas W. Moore and George F. Nichols, and by them sold and assigned to Hiram Y. Lazear, December 16th, 1870. To have and to hold the said letters patent as aforesaid, with all benefit, profit, and advantage thereof, unto the said William Phillips, his executors, administrators, and assigns, for and during all the rest and residue of the term of seventeen years for which each of the said letters patent were severally granted.

In witness whereof I have hereunto set my hand and seal this 14th day of March, A. D. 1871.

HIRAM Y. LAZEAR. [SEAL.]

In presence of—
A. E. BEACH.

[5-cent revenue stamp.]

U. S. PATENT OFFICE.

Received for record March 18th, 1871, and recorded in liber Z 13, page 112, of transfers of patents.

In testimony whereof I have caused the seal of the Patent Office to be hereunto affixed.

SAMUEL A. DUNCAN,
Acting Com'r of Patents.

72 United States circuit court, district of Massachusetts. In equity.

JAMES L. SHARP
vs.
THE DOVER STAMPING CO.

Complainant's Exhibit No. 3.—September 19th, 1876.—E. C. W., Notary.

Whereas Hiram Y. Lazear, of New York, in the county and State of

New York, did obtain letters patent of the United States of America, for certain improvements in gas heaters or broilers, which letters patent bear date the 14th day of July, eighteen hundred and sixty-eight, and are numbered 79989;

And whereas, by assignment dated March 14th, 1871, and duly recorded, said H. Y. Lazear assigned unto William Phillips, of New Bedford, Massachusetts, all his right, title, and interest in said letters patent;

And whereas James L. Sharp, of New York City, above named, is desirous of acquiring all the right, title, and interest in said invention and letters patent;

Now this indenture witnesseth, that for and in consideration of the sum of one dollar, to me, the said William Phillips, in hand paid, the receipt of which is hereby acknowledged, I have assigned, sold, and set over, and do hereby assign, sell, and set over unto the said James L. Sharp, all the right, title, and interest which I have in the said invention, as secured to me by said letters patent and assignment, together with all my right to sue for and collect damages occasioned by the infringement of said letters patent.

The same to be held and enjoyed by the said James L. Sharp for his own use and behoof, and for the use and behoof of his legal representatives, to the full end of the term for which said letters patent are granted, as fully and entirely as the same would have been held and enjoyed by me if this assignment and sale had not been made.

73 In testimony whereof I have hereunto set my hand and affixed my seal, this 29th day of April, eighteen hundred and seventy-six.

WM. PHILLIPS.

Sealed and delivered in presence of—
GEO. R. PHILLIPS.

Received for record May 3, 1876, and recorded in liber R 20, page 59, of transfers of patents.

In testimony whereof I have caused the seal of the Patent Office to be hereunto affixed.

W. H. DOOLITTLE,
Acting Commissioner.

U. S. circuit court, district of Massachusetts.

JAMES L. SHARP
vs.
THE DOVER STAMPING CO.

Defendant's Exhibit A.

William F. Shaw, of Boston, Mass. Letters patent No. 28784, dated June 19th, 1860.

To all persons to whom these presents shall come:

Be it known that I, William F. Shaw, of Boston, in the county of Suffolk and State of Massachusetts, have invented an improvement in apparatus for broiling or roasting by gas or hydro-carbon vapors, and I do hereby declare that the same is fully described and represented in the following specification and the accompanying drawings, of which

Figure 1 is a front elevation.

Figure 2 a transverse section, and

Figure 3 a longitudinal section of my said improved apparatus.

75 Figure 4 is a rear view of the steak holder and its supporter.

The nature of my invention consists in the arrangement of the steak holder, the heating chamber, and the burner or burners. Also in the arrangement of two deflectors in the heating chamber, and with respect to the burner or burners and the steak holder when arranged as specified. Also in the combination of a closed air chamber or space with the steak holder, the heating chamber, and the burners, arranged as specified.

In the drawings, A A exhibit two ærified gas burners, arranged underneath and made to open into a heating or broiling chamber or vessel; B, whose front vertical side or cover is constructed as a thin hollow box or chamber, B^1, attached to a drip pan or gravy receiver, C, the same being arranged as shown in the drawings. Against or alongside of the inner face of the said cover and within the heating chamber, a steak holder, D, is placed, it being composed of two wire frames, *a a*, hinged or connected together at or near one edge of each, and furnished with handles, *b b*. When a steak or piece of meat or other food is to be cooked in the apparatus, it is first to be placed between the two wire frames *a a*, and they are to be closed upon it so as to hold it upon opposite sides. Immediately over a long opening, *d*, made in the bottom of the heating chamber, and under which the burners are placed, I arrange an inclined deflecting plate, E, causing the same to extend across the heating chamber from end to end thereof.

Furthermore, in the upper part of the said heating chamber and over the said deflecting plate, I arrange another deflector or plate, R, and in manner or with respect to the first, as shown in the drawings. By means of these deflectors and the arrangement of the steak holder, the broiling chamber, and the burner or burners, I am able to obtain a more equal distribution of heat within the heating chamber, and less liability of burning the steak, and a better chance of collecting the gravy than when the steak holder is placed horizontally over the burners. So with respect to the closed air chamber or space in the cover, it prevents the escape of heat from the steak, and causes it to cook to better advantage than would a single plate.

I claim the arrangement of the steak holder, the broiling chamber, and the burner or burners.

Also, the arrangement of the two deflectors with the heating chamber, and with respect to the burner or burners and the steak holder, when arranged as specified.

76 Also, the combination of the closed air chamber or space in the cover, with the steak holder and the heating chamber arranged as specified.

Also, the combination of the vertical side or cover with the steak holder and drip pan, said side or cover having a closed air chamber or space, as specified and shown in drawings.

WM. F. SHAW.

Witnesses:

J. FRANCIS LORING.

WILLIAM STRONG.

Exd., F. S. K.

United States circuit court, district of Massachusetts.

JAMES L. SHARP,
vs.
THE DOVER STAMPING CO.

Defendant's Exhibit O.

UNITED STATES PATENT OFFICE.

D. C. Teller, of Terre Haute, Indiana. Letters patent No. 66911, dated July 16, 1867. Steak Broiler.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that I, D. C. Teller, of Terre Haute, in the county of Vigo, in the State of Indiana, have invented a new and improved mode of broiling steaks and toasting bread; and I do hereby declare that the following is a full, true, and exact description thereof, reference being had to the accompanying drawings, and to the letters of reference marked thereon.

The nature of my invention consists in spreading steaks in a vertical position, one edge to the fire, around small wires or rods, the upper edge being caught upon these wires or rods, and also in placing bread
78 to be toasted between these vertical wires or rods, and covering with a metal cap, having an inverted cone in the top, thereby making a uniform heat upon the steaks and bread, and rendering a speedy and effectual cooking of all parts at one time, and without any attention after the cooking commences.

To enable those skilled in the art to make and use my invention, I will proceed to describe its construction and operation.

Figure 1 is a view of the broiler and toaster, with the cover removed.

Figure 2 is a sectional view of the broiler, toaster, and cover.

The bottom of this apparatus consists of an inside and outside ring, as shown in Fig. 1, A A, with open space between, G G G G, for the heat to pass up freely. E E are vertical wire rods inserted in the inside ring, with the upper ends sharpened. B B are a cover. It may be made of sheet-iron, tin, or other light metal, and is provided with a handle, S, to remove it from the bottom when desired. C is an inverted cone in the top of the cover B, to deflect heat. The whole apparatus may be made round or oblong shape, to fit the hole in a cooking-stove or range.

The mode of operation is as follows: Around the wires or rods the steaks are spread in a vertical position, one edge downward. The upper edge of the steaks being caught upon the wires or rods, and the cap or cover being placed on, the apparatus is placed over a hole or opening in the top of a stove or range, with the fire beneath. In this position the heat is applied to both sides of the steaks at the same time, requiring no further attention for cooking. For toasting, slices of bread are placed edgeways on the movable plates D D, to prevent the lower edges from burning. These plates are only used for toasting. By inserting a stove hook or handle in the opening F, the apparatus may be removed when desired. This apparatus is very simple and useful.

What I claim as my invention, and desire to secure by letters patent, is—

The vertical position in which the steaks are placed over the fire, and the arrangement of the vertical rods E E, all substantially enclosed with the cap C, as specified for the purposes in the specification.

D. C. TELLER.

Witnesses:
E. B. ALLEN.
GEO. M. SIBLY.

80 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause in equity entitled James L. Shrap v. The Dover Stamping Company, in said circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this seventeenth day of April, in the year of our Lord one thousand eight hundred and seventy eight, and of the Independence of the United States the one hundred and second.

[SEAL.] JOHN G. STETSON, *Clerk.*

81 *Bond to party on appeal.*

Know all men by these presents, that we, James L. Sharp, of the city of New York and State of New York, as principal, and William Phillips, of New Bedford, in the county Bristol, and State of Massachusetts, and George R. Phillips, of said New Bedford, as sureties, are held and firmly bound unto the Dover Stamping Company, a corporation doing business in the city of Boston, and State of Massachusetts, in the full and just sum of five hundred dollars, to be paid to the said Dover Stamping Company, its certain attorneys, successors, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated the day of February, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas lately, at a circuit court of the United States within and for the first circuit and district of Massachusetts, in a suit in equity depending in said court between said James L. Sharp, complainant, and the said Dover Stamping Company, defendant, decree was rendered against the said Dover Stamping Company, and the said James L. Sharp having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Dover Stamping Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such, that if the said James L. Sharp shall prosecute his said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above

obligation to be null and void, otherwise to remain in full force and vitue.

JAMES L. SHARP. [L. S.]
WILLIAM PHILLIPS. [L. S.]
GEO. R. PHILLIPS. [L. S.]

Signed, sealed, and delivered in presence of—
GEO. R. GRAY.

Approved upon the consent of counsel.

J. LOWELL,
U. S. District Judge.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

(Indorsement on cover:) No. 245. James L. Sharp, appellant, vs. The Dover Stamping Company. Massachusetts C. C. U. S. Filed 10th October, 1878.

Supreme Court of the United States.

OCTOBER TERM, 1880.—No. 245.

JAMES L. SHARP,
Complainant and Appellant,

vs.

THE DOVER STAMPING CO.,
Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF ON BEHALF OF COMPLAINANT AND APPELLANT.

BY

ARTHUR v. BRIESEN,
Of Counsel for Complainant and Appellant.

Supreme Court of the United States.

JAMES L. SHARP,
Appellant,
vs.
THE DOVER STAMPING CO.,
Appellee.

No. 245.—*October Term of* 1880.

On Appeal from the Circuit Court of the United States for the District of Massachusetts.

Brief on behalf of Complainant and Appellant.

This suit is brought under a patent, granted July 14, 1868, to one H. Y. Lazear, for an improved apparatus for broiling steak by gas. The patent was, by assignment of the patentee, transferred to one W. Phillips (Exhibit No. 2, p. 43 Record), and by another assignment from Phillips to the complainant (Exhibit No. 3, p. 43 of Record). The invention described in the said patent (Exhibit No. 1, page 41) is represented and described to be an upright cylinder or shell of sheet metal, made with a lid for closing it on top, and with an open bottom. This open bottom is traversed by a V shaped horizontal trough, which extends across the lower part of the cylinder or shell, and divides the same, so as to form at its sides two equal, but separated openings, through which the flame of a gas stove, over which the apparatus is placed, may enter in two equal sheets. The said trough is filled with "plaster of Paris" "or other good non-conductor of heat," and upon this non-

conductor is directly placed a narrow pan for receiving the drippings of the meat. The meat is clasped in a wire broiler similar to a gridiron, which is, in a vertical position, placed into the apparatus, so that its lower end rests in the dripping pan, the two flat sides of the meat being equally exposed to the two sheets of flame, which enter the lower end of the cylinder in manner stated. The object of the invention is stated to be the production of an apparatus, in which both sides of the meat are equally and simultaneously affected by the heat, and in which the drippings are caught in a pan, which is protected against the injurious effects from the heat. The latter object is attained by the non-conducting filling upon which the drip pan rests, and which fills the V shaped trough. The V shaped trough serves to support the filling and the pan, and also to divide the flame, which impinges against it, into the two sheets, which thereupon ascend along the sides of the meat.

The defendant has made and sold a broiler, marked Exhibit No. 4, in which all the foregoing features are used in exactly the manner stated in complainant's patent, with the only exception that an air passage is used by defendant as a non-conductor of heat in lieu of plaster of Paris. But the defendant's own expert witness, Mr. A. W. Brown, in his answer to cross-questions Nos. 10 and 11, pages 27 and 28 of the record, has distinctly and properly admitted (what is also proved by complainant's witness, du Faur, answer 26, page 35) that such an air passage is substantially equivalent to the plaster of Paris filling used in complainant's patented device, Exhibit N, and consequently also to that mentioned in complainant's patent.

Brown's testimony on this subject is as follows:

"*Cross-Int.* 10. *Do you regard the air passage, which is directly beneath the dripping pan in Exhibit No.* 4, *to be substantially equivalent of the plaster of Paris filling, which is directly beneath the dripping pan in Exhibit N?*

"*A. I do.*"

Faber du Faur testifies as follows:

"*Q.* 26. *How does the V shaped trough, shown in Exhibit* 4, *compare with that shown in Exhibit No.* 1?

"A. I consider the V shaped trough in Exhibit 4 substantially the same as the V shaped trough in Exhibit No. 1, the only difference being in the material used for preventing the transmission of heat; but in Exhibit No. 1 the inventor does not restrict himself to any particular non-conductor of heat; I quote from the specification as follows: 'The dripping pan F rests on plaster of Paris or other good non-conductor of heat.' Air has long been known in the arts as such a non-conductor, and in Exhibit No. 4 the dripping pan is on the top of an air space, the bottom of which is formed by the V shaped trough."

In fact, the defendant's said expert witness, Brown, in his answer to direct question No. 6, page 27 of record, gives it as his opinion that the defendant's apparatus, Exhibit No. 4, differs only in some matters of detail construction, from the complainant's patented device, Exhibit N, and that the two devices are, therefore, substantially alike. He testifies as follows:

"Int. 6. Please compare Complainant's Exhibit 4 with the Defendant's Exhibit N, and state the similarities and dissimilarities of their several parts and functions each with the other?

"A. These two models resemble each other, and only differ in some matters of detail construction, such as, for instance, the shape and arrangement of the trough or pan for catching the drippings; and again, they differ as to the kind of heating apparatus in connection with which they are to be used.'

(See also his answers to questions 30, 31, 33 and 38, page 30 of Record.)

In fact, no effort whatever has been made by the defendant to disprove the infringement with which it is charged, and which, at the opening of the record, was clearly proved by complainant's witness, Sharp (Answers 9 and 18, pages 10 and 11 of Record). Therefore, it may here be considered that the infringement is admitted. An effort is made by defendant to show that its apparatus is *adapted* to be used upon the top of a stove or range, and not *intended* to be used over a coal or gas stove (page 30 Record, fol. 51), whereas complainant's patent states it to be the object of the patentee to use the patented device over a gas stove. But the means of *heating* are imma-

terial as long as the devices or mechanism used for *broiling—i. e.*, for utilizing the heat—are substantially the same; and it is proven that defendant's apparatus is applicable to a gas stove (Sharp, answer 13, page 11; F. du Faur, answer 23, page 35), and that it has actually been used with a gas stove (Mrs. Mason, answer 2, page 38, and answer 9, page 40). The immateriality of the difference is also clearly referred to by the defendant's witness, Brown, in answer to question 8, page 27 of Record, as follows:

"*Int.* 8. *Whether the efficiency of the said Shaw, Tel'er and Lazar patented contrivances would be affected by their use in connection with other sources of heat than the one alluded to in the respective patents as the source intended for use?*

"*A. I can see of no reason why they should, except in matter of degree.*"

The cause was argued in the court below, before his Honor the late Judge SHEPLEY, on the 12th day of June, 1877, and was continued under advisement by the court, until February 4, 187[illegible], and on that day the bill of complaint was dismissed with costs, without any intimation of the reasons leading to the same. The appellant is, therefore, at a loss to know how most fully to meet the views of the court below in this brief, as he does not know whether the bill was dismissed because the court held that there was no infringement, or because it held complainant's patent void, or his title insufficient.

Assignment of Errors.

The court below erred in holding that the bill of complaint should be dismissed, and in failing to hold that complainant's patent is good and valid, that the complainant is the owner of said patent, and that the defendant has infringed upon the same.

Brief.

On the question of infringement, if the court finds that the defendant's device is like that covered by complainant's patent, but "adapted" to use on a coal fire, instead of a "coal gas fire," the following authorities are respectfully referred to:

Smith *v.* Nichols, 21 Wallace, 112.
Roberts *v.* Ryer, 1 Otto, 150.

Here it was held that the inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not.

Attention is also called to the recent case of

The Swain Turbine & M'f'g Co. *v.* Ladd, 19 Off. Gaz., p. 62, 64.

where in relation to a patent for water wheels, in speaking of alleged anticipating devices, it was held as follows:

"If the evidence with regard to Stowe's wheels, constructed in 1847, 1851 and 1859 is to be relied on, it is not a sufficient answer to say that they were merely spout wheels, and were never used under water as turbines. They are substantially the same wheel as Swain's, and whether used as turbines, or only under the operation of a spout, they anticipate his structure. The mere change of use by placing them in a different position with regard to the water is not patentable."

When a patentee recommends a particular method of use in his specification he does not thereby constitute it a portion of his patent.

Sewall *v.* Jones, 1 Otto, 171, 186.
Curtis on Patents, § 320.

The answer of defendant contains no allegation whatsoever, of prior public use or sale of complainant's patented invention, but charges that the same invention had been previously described in three certain prior patents, and that it has been known to, and used by the several patentees therein named, at their respective *places of residence*. The following are the three patents referred to in the answer:

1. Patent of W. F. Shaw, of June 19, 1860.
2. Patent of J. M. Dick, of March 24, 1863.
3. Patent of D. C. Teller, of July 16, 1867.

Dick's patent has not been introduced in evidence: but Shaw's and Teller's patents have been offered, and are in evidence as Defendant's Exhibits A and O, and are respectively reproduced on pages 44 and 46 of the record.

Shaw's patent shows an apparatus for broiling or roasting by gas, in which there is a drip pan rigidly attached *to one side* of the case or shell. This side of the case or shell is removable, together with the drip pan and with the wire broiler or gridiron supported therein.

At *one side* of the drip pan is secured, within the case or shell, a deflecting plate, which partly overhangs the inlet opening of the flame, and which keeps the flame away from the lower part of the steak (du Faur, answer 9, page 33). The steak held in the wire frame is close to the removable side of the shell, and the flame enters the apparatus at the opposite side. A second deflecting plate, placed in the upper part of the apparatus, throws the flame *against* the top of the steak. Now, apart from the fact which has been demonstrated, that an apparatus (Exhibit B) constructed according to Shaw's patent, is not capable of broiling *both sides* of a steak *equal'y* and simultaneously (see Mrs. Mason, answers 4, 5 and 6, page 39; F. du Faur, answers 5, 6 and 7, page 32), and that the lower deflector plate used therein causes the lower part of the steak to remain raw, while the upper part is burned to a crisp on one side, and also left raw on the other, it is perfectly clear that the Shaw patent does not show that which is described and claimed in the first and third claims of complainant's patent. (The second claim is not in controversy). These said two claims of complainant's patent, are as follows:

1. "The V shaped trough E and the filling E^1, by which the flame is *divided* and the grease protected from burning, and smoke thereby prevented, substantially as described, in combination with a gas steak broiler."

3. "An apparatus for broiling steak by gas, whereby the steak is broiled or cooked *simultaneously on both sides*, or where the sides *are equally exposed* to the flame and heat, substantially as shown and described."

Now, Shaw's patent does not show the V shaped trough by which the flame is *divided*. This is the essential feature of the complainant's patent, and its importance and superiority is even admitted by defendant's expert, Brown, in his answer to question 9, page 27 of Record.

An apparatus admitting a continuous sheet of flame, without *dividing* it by a trough, is not and cannot be an infringement of complainant's patent, nor an anticipation of it. And not only is the *dividing* trough not shown in Shaw's patent, but also the filling E^1, is omitted, which is described as follows, in Lazear's patent:

> "*The dripping pan rests on plaster of Paris, or other good non-conductor of heat* E^1, *with which the V shaped trough E is filled or nearly filled, as seen, for the purpose of preventing the heat of the flame from burning the grease in the dripping pan, and thereby preventing smoke in the operation of broiling.*

And as to the V shaped trough, the complainant's patent speaks as follows:

> "*E is a V shaped trough, against which the flame impinges and is spread or divided, and rises on* EACH SIDE, *as seen in the drawing.*"

Even Mr. Brown, the defendant's witness, admits in his answers to questions 26 and 28 (page 29 of Record), that the Shaw Broiler Exhibit B, does not heat the meat equally on both sides; that there is but one opening in Shaw's apparatus for admitting the heat, instead of two as in Lazear's; that in Shaw's apparatus a non-conductor of heat is *not* interposed between the drip pan and the fire (answer 37, page 30). It has also been demonstrated that the heating chamber, at one side of the steak, is in Shaw's apparatus from 12 to 16 times larger than at the other (du Faur, answers 11, 12, 13, 14, page 33), and that in all the essential features Shaw's patent does not resemble that of Lazear. But, even admitting, for the sake of argument, that the Shaw burner is capable of broiling a steak equally and simultaneously on both sides (which, however, cannot be done), the Shaw patent would, nevertheless, not an-

ticipate the first claim of the Lazear patent, in that it does not show nor describe, nor in any manner indicate *the V shaped trough and the filling, by which the flame is divided*, as specified and as specifically set forth in the first claim of complainant's patent (du Faur, answer 27, page 35; answer 31, page 36; answer 47, page 38). The Shaw patent expired, and has become public property, and if it describes an apparatus as useful as complainant's, the defendant would have made haste and been at liberty to use it, without paying royalty, ever after June 19, 1874 (it was a fourteen year patent; see last section on page 14 of Record). But instead of doing so the defendant deliberately adopted *the V shaped trough and filling, by which the flame is divided*, as described and claimed in complainant's patent, thereby admitting the absolute superiority of complainant's patented device.

An attempt has been made to show that the dividing trough is not superior to the single inlet of Shaw's patent, but it is not competent for the defendant, who has used the dividing trough, to attempt to prove that there is no merit in that construction.

Whitney *vs.* Mowry, 4 Fisher, 207:

"*The defendant having used the process patented, is estopped from insisting that a portion of the process is useless.*"

Coleman *vs.* Liesor, MS. Leavitt, J. Law's Digest, page 281, § 28:

"*If the defendants have used the plaintiffs' invention, or something substantially like it, they are estopped from denying its utility, for use implies utility, and it is fair to presume that they would not use it, if they thought it of no utility.*"

Also, Vance *vs.* Campbell, 1 Fisher, 485, where it was held that:

"*If the defendants have used this improvement, or something substantially like it, they are estopped from denying the utility of the plaintiffs' invention; for in that case the use of the thing patented, would imply that the party thought it of some utility.*"

The defendant, having in this case made and sold boilers, having central dividing troughs, combined with non-conducting filling, which is the device patented by complainant, it can only undertake to successfully attack plaintiff's patent by proving absolute prior use and knowledge of such dividing

trough. In this the defense has failed. To show that Shaw's side pan and side opening, which defendant has not used, and which complainant has not patented, had been previously known, does not meet the case.

The *Teller* patent, Exhibit O, reproduced on pages 46 and 47 of the record, is a cylindrical vessel, having a central opening in the bottom, and an annular opening around the central opening, and a series of vertical spikes projecting from the annular bottom that intervenes between said two openings. A conical deflector is suspended into the central space, from above. This apparatus has not the V shaped trough, nor the filling, nor the dripping pan referred to and claimed in complainant's letters patent, nor any semblance thereto; is not adapted to be used in connection with a removable wire broiler, like complainant's device, and does not *evenly* distribute the flame along the two faces of the meat that may be laid around the wires. It is in no manner an anticipation of complainant's first claim, nor of the third claim, if the words "substantially as described" in said claim, have the effect of pointing to the specification and drawing.

Smith *vs.* Goodyear Dental Vulc. Co., 3 Otto, 486, 493.
Ames *vs.* Howard, 1 Sumner, 482, 485.
Ryan *vs.* Goodwin, 3 Sumner, 514, 520.
Blanchard *vs.* Sprague, 3 Sumner, 535, 539.
Pitts *vs.* Whitman, 2 Story, 609, 621.
Smith *vs.* Downing, 1 Fisher, 64, 69.
Ransom *vs.* Mayor, 1 Fisher, 252, 260.

Nor is there throughout the entire testimony given on behalf of defendant, an attempt made to show that the Teller patent is for the same invention as the Lazear patent; on the contrary, the defendant's expert, Brown, in answer to Question 4 (see lines 14 to 16 of page 26), distinctly shows that "*There is no dripping pan shown or described in the Teller contrivance, nor any construction of the bottom to prevent the conduction of heat through it;*" and thereby admits the essential difference between the two devices.

The Lazear patent does not *cover* the apparatus described in

the Shaw and Teller patents, therefore it cannot be anticipated by them.

Eickemeyer Hat Blocking Co. *vs.* Pearce, 10 Blatchford, 403.

The defense having therefore failed to show that the complainant's patent has been anticipated, or that the defendant has not infringed on said patent, the affirmative of infringement having been, however, fully proved by the complainant (Sharp's answers 9 and 10, page 10), and admitted as stated, it follows that the complainant is entitled to a decree and injunction, as prayed for in the bill of complaint.

An abortive attempt has indeed been made on behalf of the defendant, to prove want of novelty, prior public use and sale of the Lazear invention, by one Wm. F. Shaw, and much testimony has been offered in this respect, under the strenuous objection of complainant's counsel, as fully appears from the objections stated on pages 14 and 25 of the record. The name of Wm. F. Shaw, as that of a person having knowledge of prior public use and sale of any device not patented by him, Shaw, was not stated in the defendant's answer, as provided by section 4920 of the Revised Statutes, and his testimony having been taking under objection, cannot therefore be regarded. The answer does state that he had previously used the invention at his *residence*, and as patentee; this was not such a notice as was apt to put the complainant on his guard against a defense of prior *public* use and sale.

Roberts *vs.* Buck, 1 Holmes, 224.
Earle *vs.* Dexter, 1 Holmes, 412.
Silsby *vs.* Foote, 14 Howard, 218.

The complainant therefore asks that his motion to strike out questions and answers 5, 10, 12 to 38, inclusive, of Shaw's testimony, and questions and answers 4 and 5 of Brown's testimony, and to disregard the cross-examination, *de bene esse*, of said witnesses, and to disregard also the exhibits C, D, E, F, G, H, I, K, L and M, offered by the defendant in support of the allegation of want of novelty, be granted.

But even if these proofs be deemed admissible, it is further submitted that they do not in any manner affect the complainant's patent. Exhibit C, a bungling machine, which will never

broil a steak (Mason's answer 4, page 39; F. du Faur, answer 28, page 36), was especially made for effect in this suit (Shaw's answers 39, 40, 41, page 19). The first one ever made by Shaw was made in 1856 (answer 15, page 16), and the last one ever made was made before 1856 (answer 42, page 19); in other words, it was first and last made in 1856. It is not proved that one, or more than one, such machine was ever sold, but only that they were *offered* for sale (answer 38, page 19), and this does not appear certain.

The following is Shaw's testimony on this point:

"*Int.* 15. *About when did you make such device?*

A. As near as my recollection serves me, I think it was about the year 1856.

Cross-Int. 42. *When last did you make anything like Exhibit C?*

A. As near as my recollection serves me, before 1856.

Int. 38. *Where were these made and sold or offered for sale?*

A. They were offered for sale on Washington street, opposite Bromfield street, in Boston. Some parts were made on my own premises, and some in Roxbury. Castings were made in Roxbury.

Cross-Int. 39. *When was Exhibit C made; that particular one?*

A. It has been made within two months.

Cross-Int. 41. *Did you understand the object for which it was made by you?*

A. I was told it was to be used in an infringement suit.

Shaw does not remember *when* he was at the place where he had it (answers 56, 59, 61, page 20), and cannot therefore fix the time. He used one in his house, but no one else ever used one, as far as he proves (answer 46, page 19). In other words, it is an abandoned experiment brushed up and polished for use in this suit.

It has no V shaped trough for *dividing* the flame, but does have a conical swinging bottom, hung *eccentric* in the machine, to admit more heat to one side than to the other of the meat. It has not a dripping pan that rests *on* the non-conducting filling, but it has a *pan* which is raised two inches from the cone to admit the full heat into direct contact with it (F. du

Faur's answers 15 to 22, pages 33–35 of Record). The effect is that no gravy can remain in the pan, which is heated to consume it (F. du Faur's answers 19, 20, 21, pages 34 and 35; also answer 36, page 37 of Record).

That a "trough" such as is called for in the first claim of complainant's patent is not shown in Exhibit C appears clearly from Mr. Brown's definition of a trough as given in the record:

"*Cross-Int.* 40. *What is a trough?*

A. A trough, in my opinion, is a vessel which is longer than it is wide, and is capable of holding liquids, more particularly without escaping from it.

A piece of meat suspended from the pointed hooks of this machine will, in the centre, be five inches from the flame, and at the edges in direct contact therewith (F. du Faur's answers 28 and 30, page 36), and is not, therefore, equally exposed to the flame, nor is the flame divided as in complainant's patent (answers 30–33, page 36; 44 and 45, page 38). In fact, it appears probable that the apparatus was intended as a sort of cooking stove, and when found to be a failure was abandoned. It is certainly suggestive that the hooks shown in Exhibit C were not illustrated in the cut Exhibit M, which cut is said to have been made in 1856 (Shaw's answer 26, page 17). Had the machine been, at that time, intended for a beefsteak broiler, the means for holding the steak in place would certainly have been shown.

Shaw, in answer to Ques. 66, pages 20 and 21, says: That he exhibited, at a fair in 1856, things not like Exhibit C, but such made after the same principle, pointing to Exhibits D, F, H and L. Yet immediately after, he proves (answers 69, 72, 71 and 73, page 21) that Exhibits D, F, H and L are *not broilers at all*, only furnaces.

The picture Exhibits D to L, inclusive, excepting Exhibits G and I, which show the Shaw patented broiler, are therefore not illustrations of broilers, but of gas stoves (Shaw's answers 69, 70 to 74, page 21 of Record). As to the Shaw apparatus, Exhibits B, G and I, *no proof whatever* of prior public use has been brought; in fact, the witness Shaw is only asked one single question on this subject (Ques. 10, page 15), and to this he replies: "They were *probably* made in 1860." This is all the

proof on the subject. It is submitted that even if Shaw's device were like complainant's, such "*probable*" proof of prior use has not the positive character required by statute and by the courts, in order to defeat the title to a patent.

"*Nothing short of* PROOF *that the invention was on sale or in* "PUBLIC *use for a period exceeding two years before the applica-* "*tion for a patent, will support a defense under the statute relating* "*to use and and sale before application.*"

Jones *vs.* Sewall, 6 Fisher, 343.

"*Public prior use by others will not work a forfeiture of the* "*patentee's title, as such forfeiture is not favored unless it* CLEARLY "*appears that the use was solely for profit and not for the purpose* "*of further improvement or experiment.*

IBID.

Yet as to Exhibit C, it is clear that if ever used at all, it was only experimental use, and comparing it with complainant's patent it fails to show the "V shaped trough" claimed therein. As the trough form is *an essential element of form*, the case comes well under the view expressed in Werner *vs.* King, 6 Otto, p. 230, where it was held that form, if of the essence of the invention, is necessarily material. It is in this case so material that nothing short of substantially a "trough" form, arranged to divide the flame, will invalidate the patent.

The Assignment.

The bill of complaint, after setting forth the issue of the patent to Lazear, the patentee, on the 14th July, 1868, and an assignment from Lazear to one W. Phillips, on the 14th of March, 1871, shows that said Phillips, on the 29th April, 1876, by a deed duly executed and recorded, assigned to the complainant, J. L. Sharp, all his right, title and interest in the said patent, *and also the right and privilege to recover damages for past infringements of said patent.*

The assignment from Phillips to Sharp is in evidence (Exhibit No. 3), and is reproduced on page 43 of the record. It grants to the complainant for valuable consideration, in plain terms, all the right, title and interest which the said Phillips has in said patent, "*together with all my right to sue for and collect damages occasioned by the infringement of said Letters Patent.*"

The defendant in the first part of his answer, by what it terms its demurrer, but which in view of the absence of the counsel's certificate and defendant's affidavit, prescribed by the 31st rule of rules for Courts of Equity, is not a demurrer proper, denies the complainant's right to recover damages for acts done by the defendant prior to April 29, 1876, the date of Exhibit No 3. This defense, in view of the special clause contained in said assignment as to the transfer of *all* of Phillips' right to sue for and collect damages for infringement, cannot be a general denial as to the right of an assignee to recover for damages accrued to the assignor, pending the assignor's title in the patent, but is a denial of the right of Phillips to assign *his claim for damages*, which, without such assignment, he might have collected.

It is clear that Phillips cannot now sue for or recover any damages which he may have suffered prior to April 29, 1876, from the infringement of said patent. He has sold all his right to recover such damage.

The Supreme Court, in Moore *vs.* Marsh, 7 Wallace, 515, held that an ordinary assignment does *not* carry with it a transfer of the right to damages for an infringement committed before such an assignment. But the same court has never denied the right of a citizen to assign by special assignment claims accrued, and to be sued for and collected by the assignee. Thus in Comegys *vs.* Vasse, 1 Peters, 193, 213, it was distinctly held that—

"*Vested rights, ad rem and in re, possibilities coupled with an* "*interest, and claims growing out of and adhering to property* "*may pass by assignment.*"

Again in Batesville Institute *vs.* Kaufmann, 18 Wallace, p. 151, 154, it was stated that—

"*No principle is better settled than this, that the assignment of a*

"*debt carries with it an assignment of a judgment or a mortgage "by which it is secured.*"

thus recognizing the propriety of assigning a debt.

So also in Bradley *vs.* Rhine's administrators, 8 Wallace, 393, 396, the right of an assignment to a chose in action and the consequent right of the assignee to recover by suit was distinctly recognized. The very able opinion of Judge BLATCHFORD in Dibble *vs.* Augur, 7 Blatchford, p. 86, founds a final decree upon a suit by the assignee of the right for past infringements, for such past infringements, and comments on the case of Moore *vs.* Marsh, 7 Wallace, above referred to, and in this decision it is distinctly held that the effect of such an assignment is to vest in such an assignee "all interest in all claims for *past* infringements."

The record shows (p. 10), that the defendant made the infringing goods as early as in April, 1876, and has sold them since, so that the bulk of the infringing acts was probably performed since the date of Exhibit No. 3.

In view of the whole record, it seems clear that the complainant's patent is a valid patent; that the complainant is the sole owner of it, and that the defendant has infringed upon his rights under the same. If this be so, the decree of the court below should be reversed, with instructions to issue an injunction, restraining the further infringement complained of, and to refer the cause to a Master for an accounting.

Respectfully submitted by

New York, January 7, 1881.

ARTHUR V. BRIESEN,
Of Counsel for Appellant.

SUPREME COURT U.S.
FILED
MAR 9 1881
JAMES H. MCKENNEY, CLERK

SUPREME COURT OF THE UNITED STATES.

APPEAL FROM THE DISTRICT OF MASSACHUSETTS.

JAMES L. SHARP, APPELLANT,

v.

THE DOVER STAMPING CO.

BRIEF FOR APPELLEE.

THOS: WM: CLARKE, ESQ.,
J. L. S. ROBERTS, ESQ.,
of Counsel.

Supreme Court of the United States.

APPEAL FROM THE DISTRICT OF MASSACHUSETTS.

JAMES L. SHARP, APPELLANT,

v.

THE DOVER STAMPING CO.

BRIEF FOR APPELLEE BY THOS: WM: CLARKE.

CASE.

Complainant is the assignee through mesne assignments of Hiram Y. Lazear, of New York, of Letters Patent dated July 14, 1868, No. 79,-989, for improvement in Gas Heaters.

Subject Matter—Patented Apparatus.

The patentee's invention was for an apparatus for cooking steak by gas.

It consisted, as shown in the patent, of a double-

walled oval casing, suitable for sustaining and enclosing an upright gridiron over a gas stove.*

At the bottom of this oval casing, in contact with the gas flame which was to furnish the heat, was a V-shaped trough filled with plaster or other non-conducting material upon which the dripping-pan rested, below the steak and steak-broiler.

The apparatus patented was introduced in evidence as Exhibit N. This was of the form usually made. It omits the double-walled casing of the patent, — has only a single wall (*see page* 23 *of Record*).

Defendants' Apparatus.

The defendants' manufacture is a sheet-tin cylinder, having a removable cover. A tin-lined V-shaped trough of two thicknesses, with an air space between, crosses the cylinder from side to side near its bottom, and conducts the gravy falling from the meat into a cup suspended on the outside of the cylinder. The ordinary iron broiler containing the steak sits in the trough while it is in use. It is intended to be used over the pot-

* *Note.* — In practice, the double wall was not always used, but it was shown in the patent and claimed in the second claim.

hole of an ordinary cooking-stove. It is shown in Exhibit 4 (*pp.* 10, 30–51 *of Record*).

Defendants' Apparatus not a Gas Stove.

When used by complainants with gas, it behaved very badly, and the appearance of the exhibit shows that practically it would require a new apparatus for almost every steak (*see Record Complainant's Evidence, p.* 39).

Alleged Infringement.

The *claims* alleged to be infringed are, —

1st. The V-shaped trough E, and filling E′, by which the flame is divided and the grease protected from burning, and smoke thereby prevented, substantially as described, in combination with a gas-steak broiler.

2d. An apparatus for broiling steak by gas, whereby the steak is broiled or cooked simultaneously on both sides, or where the sides are *equally* exposed to the flame and heat, substantially as shown and described.

DEFENCE.

No Infringement.

1. Defendant denies the making of gas heaters embracing the invention of the patent. The thing made by defendant, Exhibit 4, was intended for a "smothering dome" or apparatus for cooking by radiant heat from a pot-hole of a stove, over a fire of coals, without requiring the products of combustion to pass through the apparatus, and without contact of the flame with the meat. Complainant proved the inefficiency of defendants' apparatus for use with a gas flame, and indeed its incapacity, save as a mere gymnastic.

Anticipation.

2. Defendant avers prior invention by others than Lazear, disclosed in prior patents and known to prior patentees at their respective residences, and enumerates as the patents and patentees, No. 28,781, June 19, 1860, William F. Shaw, of Boston, Mass.; No. 38,018, March 24, 1863, James M. Dick, of Buffalo, N.Y.; No. 66,911, July 16, 1867, D. C. Teller, Terre Haute, Ind.

Analysis of Prior Patents and Apparatus.

The Teller and Shaw patents are in evidence, and Shaw was a witness. The Dick patent was not put in evidence.

The Teller patent (p. 46) shows an apparatus for suspending steak, &c., one edge to the fire, under a cover, the apparatus being adapted to be used over the pot-hole of a cooking stove or range.

A year before Lazear then, if the apparatus to be used over the pot-hole of a range is a gas cooking apparatus, Lazear was completely anticipated by Teller, save so far as Lazear introduced a dripping-pan resting on a V-shaped trough packed with non-conducting material; and save by such an apparatus, there could be no infringement.

But not only had Teller broiled on both sides over the pot-hole of a range, but Shaw, in 1860, had done the same thing in his apparatus patented June 19, 1860 (*see Exhibit B, and p.* 15, *ints.* 7, 9), which had a drip-pan, marked C in the drawings, and an air space under it (*p.* 16, *int.* 11).

And this thing of Shaw's was the culmination of his work for many years.

Under the objection that his name is not in the answer as a person having prior knowledge as to these things, Shaw testified.

SHAW'S EVIDENCE IS ADMISSIBLE.

The answer says that *the invention or discovery had* been "described and set forth in the following Letters Patent of the United States, and *known to and used by* the several patentees therein named, AT the places of their respective residences, as hereinafter stated; that is to say, No. 28,781, dated June 19, 1860, and granted to *William F. Shaw, of* BOSTON, MASSACHUSETTS."

To read this distributively, with proper regard to context, the preposition governing the person, and the person's name, the subject and predicate of the sentence, are printed *in italics*, and the preposition governing the place, and the name of the place, in SMALL CAPITALS; and the averment of the answer is as follows: —

The invention or discovery had been known to and used by William F. Shaw, of Boston, Massachusetts, at said Boston.

The answer then sets up prior knowledge and use by William F. Shaw (of Boston, Mass.), at Boston, Mass.

It complies with the statute, and the evidence

is admissible not only to limit the scope of the patent, but also to impeach its validity.

Shaw's Prior Labors.

Shaw made a cooking apparatus like Exhibit C, as early as 1856 (*p.* 16, *ints.* 13, 14, 15).

It was used for broiling, and was sold (*ints.* 17, 18). It broiled the meat or fish simultaneously on both sides (*int.* 19). The juices were saved by a drip-pan which rested on a disc or cone filled with plaster of Paris and hard-coal ashes, (*p.* 16, *int.* 13; *p.* 17, *ints.* 20, 21.)

From this came sundry heating, broiling and baking apparatus. Shaw had cuts of these made. Exhibits G and I show broilers. They were used with stoves shown in Exhibits D and L, as follows: —

Exhibit G with stoves H, L.
Exhibit I with stoves D, F, I, K.

(*p.* 18, *ints.* 28, 31, 32.)

Meat was cooked on both sides at the same time over burning gas (*p.* 18, *int.* 33), and there was an air space under the dripping-pan (*p.* 18, *int.* 30) which protected the gravy from burning (*int.* 31).

State of the Art.

This, then, was the state of the art:

Before the time of Lazear, apparatus existed and was in use in which steak was cooked on both sides simultaneously by contact of the products of combustion of a gas flame; and in this apparatus there was a long dripping-pan with a long air space under it. There was also apparatus for the same purpose used with the same effect, which had a square dripping-pan and a cone disc packed with non-conductor, which cone disc divided the flames.

There was also an apparatus for smothering under a cover or dome placed over the pot-hole of a furnace, and doing its work by radiant heat.

Scope of the Lazear Patent.

Lazear then advanced the art by his apparatus as follows: —

1. He split the products of combustion into two sheets by his transverse V-shaped trough, and he changed the shape of the non-conducting shield below the dripping-pan. He also changed the shape of the casing.

This probably economized gas and material

used in construction of the apparatus. And his patent may be good for this.

Defendants' Apparatus does not Infringe.

Defendants' apparatus is an improvement on the Teller apparatus.

It uses the Shaw gridiron of the 1860 patent; it protects its dripping-pan, as Shaw protected his in 1860 and before, by an air-space. It introduces a new and more convenient dripping-pan, not indicated by Lazear, conducting the gravy away from danger of burning. The casing is the Shaw casing of 1856, shown in Exhibit C and Exhibit M.

The apparatus then complained of is in form the original Shaw apparatus for cooking by gas, used and introduced in 1856, modified by using the CONDUIT dripping-pan, which was new, instead of the *depository* dripping-pan borrowed by Lazear of Shaw, and also by use of the double-wire broiler instead of the hook broiler of 1856. The double-wire broiler is no part of complainant's combination; it was used by Shaw in 1860 in combination with the depository dripping-pan, protected by an air space, as defendants' is.

These old uses and things are in a gas broiler for

cooking as complainant cooks. But Teller had invented another broiler for another application of heat from another source, and it was to this Teller broiler that these improvements from Shaw's gas stove and these new inventions of defendants were applied.

And complainant proves that, as organized in defendants' apparatus, there is and can be no analogy between the gas broiler and the pot-hole broiler, and that defendants' apparatus is not a gas broiler at all, and therefore not an infringement.

The appeal should be dismissed, and the judgment of the Circuit Court affirmed.

Fred'k H. Clarke

E. L. S. Roberts